United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-7567

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THOMAS W. EGGERT,
Plaintiff-Appellant,

vs.

NORFOLK & WESTERN RAILWAY COMPANY and
ERIE LACKAWANNA RAILWAY COMPANY,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

APPENDIX FOR PLAINTIFF-APPELLANT

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Exhibit D-9--Report re February, 1972 Arthrogram. Marked for identification at page 428a.

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VOLUME I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT,

Plaintiff,

-vs- CIVIL 73-370

NORFOLK & WESTERN RAILWAY COMPANY, and
ERIE LACKAWANNA RAILWAY COMPANY,

Defendants.

Trial of the above entitled action held before the HON. JOHN T. ELFVIN, United States District Judge, and a Jury, commencing on October 5, 1976, at Buffalo, New York.

APPEARANCES: JOHN T. COLLINS, ESQ., and
JOHN F. COLLINS, ESQ.,
Appearing on behalf of the Plaintiff.

RICHARD F. GRIFFIN, ESQ.,
Appearing on behalf of the Defendants.

* * * * *

Transcript of Proceedings, October 5, 1976.

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PROCEEDINGS OF OCTOBER 5, 1976, COMMENCING AT 9:10 A.M.

THE COURT: Now, ladies and gentlemen, we are going to draw a jury in one case, a jury of twelve persons and one alternate, for Civil 73-370, which is a case by Thomas W. Eggert against the Norfolk and Western Railway Company. It is a non-criminal case, and we won't be worried about whether or not you have any relatives or close friends who are police officers. This time we will want to know whether you have any connections or particular experience with any railroad, because that would be a factor, and also the attorneys will want to know whether or not you have been involved in any accident of personal injury cases, particularly that have been either litigated or unsatisfactorily resolved, and also whether you have any stock in any casualty company or insurance company that insures against liability, otherwise our proceeding is the same. The railroad defendants are represented by Mr. Richard Griffin, who sits at your right and my left, and Mr. Eggert, I believe, is the gentleman

facing me at the table in the center, and the case will be tried by Mr. Collins, Sr., is that correct?

MR. COLLINS, SR.: Yes, your Honor.

THE COURT: John Collins, Sr., sitting closest to me, and with him, at least at this time for this purpose, is his son, John. If you know any of the attorneys or parties, that would be factor also. Fill the box. Incidentally, you are prepared to go ahead with the trial then?

MR. COLLINS, SR.: Yes, your Honor.

THE COURT: All right. We will be trying the case today and tomorrow and maybe a third day, it is not a long case.

(Thereupon a jury and one alternate was duly empaneled and sworn.)

THE COURT: Let me talk with the attorneys for a moment.

(Thereupon an off the record discussion ensued at sidebar.)

THE COURT: All right. The jurors who have not been

selected may leave, and we will be in touch with you when we next need to have you back. Now, we will proceed with the case after a brief recess. You go with the deputy marshal at this time and take any of your personal belongings with you. He will show you the room to which you will come from time to time and which you will use during recesses, and which you will use ultimately for your deliberations. You go down with him at this time and I will have you back in the courtroom in a brief period.

(Thereupon the court was in recess at 10:40 A.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 11:05 A.M.

(Jury present.)

THE COURT: Now, we will be working, ladies and gentlemen, basically beginning at nine o'clock each morning and going until twelve o'clock, with a brief mid-morning recess, and resuming at one o'clock and working until four o'clock,

again with a brief recess in the middle of that afternoon. You can basically plan on that, and the only departure from that would be if we run into some special problems with a witness, as sometimes happens, and we do find someone who cannot be around within that time frame, and we can accommodate him within a reasonable manner or we might have a witness who we may start with, and that witness needs to be away that day, and that might run us a little longer. Then, of course, one day, the final day when the evidence has been completed and the attorneys have argued to you and summed up their cases, and I have instructed you on the law, then you would go into your deliberations, and depending on the chronology of that, again sometimes you may find your working period extended a bit because of deliberations. Now, we start out all of these cases by having the attorneys tell you in their opening statement what each intends to prove in the case, and Mr. Collins will speak to you initially, and then Mr. Griffin will speak to you, and I caution you in that

regard, as I will from time to time throughout the case, that although the attorneys in this opening statement will be talking about evidence and dealing with evidence, that nothing that either attorney says to you in that statement or during the trial in some comment or question or later on in their summations or closing arguments, nothing of that type is evidence. The evidence you will get from the witnesses who will be sworn and take the witness stand, and from documentary evidence, photographs or items such as that, that are offered and I admit into evidence. It will come out during the trial in the interrogation of different witnesses on the stand that there had been an earlier trial of this case, and there will be some reference back to testimony that may have been given by the witness on that particular trial. There was an earlier trial, but that trial did not dispose of the case, it left it as if it had not been tried and, consequently, it is here to be tried and decided by you, and you are not to speculate about what happened

or did not happen on the first case, except the attorneys may bring to your attention some alleged discrepancy between a witness' testimony then and what he may be saying now, and I will advise you of that again. During our recesses, particularly at our noon recess and overnight recess, I will be admonishing you, and I will do that generally at this time, that even as you are hearing or have heard part of the evidence in the case, I want you to keep your minds open and undecided as to the factual issues. I want you not to talk about those issues among yourselves until the case is fully concluded and I have instructed you on the law. Most importantly, you are not to talk with anybody outside of yourselves about it. If anyone tries to talk with you, I want you to let me know about it immediately. The only further caution is that they will be talking about certain places where things happened, and if you have some knowledge already about those places, so be it, you should listen to the witnesses and look at the documents and decide it on that basis.

There is no way I can erase something from your mind, but do not yield to the temptation to go down to some particular spot and review the scene yourself before we have ended the case and reached your verdict. What you know about the physical setup and arrangement should come from the evidence in the case and not from something outside. The purpose of the opening statement is to have the attorneys tell you what they intend to prove or what they think will be proven by the evidence in the case, and its purpose is to merely give you an overall picture or outline or framework within which the individual pieces of evidence, as they come into the case, and they must come in in pieces, that you will be able to orient those and give them some relationship, one to the other, as against the full picture. As I said before, what Mr. Collins will be saying to you now is not evidence, and what Mr. Griffin will say to you is not evidence. Mr. Collins.

(Thereupon Mr. Collins, Sr. opened to the

jury on behalf of the plaintiff.)

THE COURT: Mr. Griffin.

(Thereupon Mr. Griffin opened to the jury on behalf of the defendants.)

THE COURT: Ladies and gentlemen, normally we would be going ahead with the evidence, but we are that close to our noon recess time that I am going to forego the beginning of testimony until after lunch. So I will excuse you at this time, and you come back to your room downstairs at one o'clock, and we will have you up promptly and begin the evidence. You may go.

(Thereupon the court was in recess at 11:55 A.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:30 P.M.

(Jury absent.)

THE COURT: Mr. Collins, these exhibits, have you assigned the same numbers that were used earlier?

MR. COLLINS, SR.: No, I did not. We did not have some of those until this morning.

THE COURT: All right. You are going to run into a problem, we are going to be dealing with divergent numbers.

MR. COLLINS, SR.: Well, I don't think that should be a problem.

THE COURT: I hope not.

(Thereupon Plaintiff's Exhibits 3 through 24 were premarked for identification.)

(Thereupon the jury entered the courtroom at 1:35 P.M.)

THE COURT: All right, as soon as you are ready, Mr. Collins.

MR. COLLINS, SR.: Mr. Eggert, please.

THOMAS WILLIAM EGGERT, 25-A Garden Village Drive, Cheektowaga, New York, called as a witness on his own behalf, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Eggert, how old are you?

A. Forty-six years old.

Q. What year were you born?

A. 1930.

Q. And after you came of age were you employed by the Erie Lackawanna Railroad?

A. Yes, I was.

Q. When did you first hire out on the Erie Lackawanna?

A. July 29, 1953.

Q. By the way, was that the old DL&W or was it known as the Erie Lackawanna at that time?

A. It was known as the DL&W.

Q. Delaware, Lackawanna & Western?

A. Yes.

Q. And later sometime they merged with the Erie Railroad and became known as the Erie Lackawanna?

A. Yes.

Q. Prior to going to work on the DL&W, had you had any previous employment?

A. Yes, I had.

Q. Where had you worked?

A. I had worked with my father, and also for Ford Company.

Q. What did your father do?

A. He was a carpenter contractor.

Q. Was that in the Buffalo area?

A. No, it wasn't.

Q. Whereabouts was that?

A. That was in Delevan, New York.

Q. Then did there come a time that you went into the military service?

A. Yes.

Q. Do you remember when that was?

A. 1947.

Q. What branch of the service did you go into?

A. The United States Army.

Q. How old were you then?

A. Seventeen.

Q. You had a physical examination when you went in?

A. Yes.

Q. How long did you stay in the Army?

A. I served an eighteen month hitch.

Q. And you had a physical examination when you came out?

A. Yes.

Q. How old were you when you got out of the Army?

A. Eighteen and a half.

Q. What year was that?

A. 1948.

Q. Then you worked at these various places you said with your father?

A. Yes.

Q. And where was the other place of employment?

A. Ford Motor Company.

Q. What is your educational background?

A. Elevanth grade.

Q. Eleventh grade?

A. Yes, sir.

Q. Was that in Delevan, New York?

A. Yes.

Q. Then there come a time that you hired out on the Delaware, Lackawanna & Western, and did you take a physical?

A. Yes, I did.

Q. Do you remember what doctor examined you at that time?

A. I'm not certain, but I believe it was Dr. Tronolone.

Q. Did you continue to work as a fireman on the Delaware, Lackawanna & Western?

A. Yes, I did.

Q. What do the duties of a fireman entail?

A. Well, we were dieselized then, the fireman's duties at that time were to assist the engineer, also to learn to become an engineer through practical experience, to supply and

check the engine, this type of thing.

Q. This learning to become an engineer, how did you actually learn to become an engineer?

A. By the engineer allowing me to run the engine.

Q. They would watch you and tell you how?

A. Yes.

Q. Then did there come a time that you had to take an examination for promotion to engineer?

A. Yes.

Q. What did those examinations consist of?

A. Well, there were air brake examinations and mechanical examinations, characteristics of --

Q. Did the railroad give you books to read on that?

A. Yes, they did.

Q. Did they have classes on those particular subjects?

A. Yes, they did.

Q. Did there come a time that you were promoted from fireman to engineman?

A. Yes.

Q. That was after a test?

A. Yes.

Q. Do you remember when you were promoted to engineman?

A. I believe it was 1960.

Q. At that time was it the Delaware, Lackawanna & Western or had it merged?

A. I'm quite certain it was the Delaware, Lackawanna & Western; in fact, I know it was.

Q. Do you know when the Delaware and the Erie Railroad merged?

A. No, not exactly, I can't recall.

Q. Then you continued to work as an engineer for the merged railroads?

A. I was promoted but I was firing, I believe, at the time they merged.

Q. Did there come a time that you started working as an engineer?

A. Yes.

Q. When was that?

A. Approximately 1965.

Q. 1965?

A. Yes.

Q. What did your duties entail as an engineer, what actual work did you do?

A. Well, responsibility for the handling of trains, and the locomotive power, responsibility for the headend of the train, the whole train for that matter, but the engineer's responsibility was the headend.

Q. That would be the power of the engine itself that you had charge of?

A. Yes, and the handling of the train.

Q. When working with a crew, do you have other members that are not connected with the engine?

A. Yes.

Q. As far as operating it?

A. Yes.

Q. What does that crew usually consist of?

A. As a rule they consist of three men, that is, a conductor, a fieldman and a headman.

Q. The fieldman and headman, are they commonly referred to as brakemen?

A. Brakemen or switchmen.

Q. Then the conductor would be a promoted brakeman or switchman?

A. Promoted conductor, yes.

Q. Does he have charge of the movement of the train, as well as the engine?

A. Yes, he does.

Q. Then actually he would be your immediate supervisor, is that right?

A. Well, the conductor and engineer are equally responsible for the train.

Q. Is he the one that gives the movements and gets them from say the yardmaster, then he knows where the cars are to go?

A. Yes.

Q. The engineer doesn't become involved in that?

A. No.

Q. So was there a practice on the railroad in 1971, say June

of 1971, as far as the operation of the engine or the locomotive itself, as far as distributing the work between the engineer and the fireman?

A. Yes, this all depends.

Q. What does it depend on?

A. It depends on the engineer, if he sees fit to allow the fireman to run or operate the locomotive. It is entirely up to the engineer. It is his responsibility if he allows him to run it.

Q. You would have to allow a fireman that was working under you to run the engine?

A. Yes.

Q. And what would you do?

THE COURT: It don't mean you had to allow him, he couldn't run it unless you did allow him?

THE WITNESS: Yes, sir.

BY MR. COLLINS, SR.:

Q. What did you do while the fireman was running the engine?

A. I was on the left side, I would take over his responsibilities.

Q. Now, as far as an engine is concerned, do they have the engineer's seat on one side and the fireman on the other?

A. Yes.

MR. COLLINS, SR.: Do you have any pictures of the engine, Mr. Griffin? I think you had before. Do you have them?

MR. GRIFFIN: The subpoena covered Engine 2500.

MR. COLLINS, SR.: Well, any engine that looks like that.

MR. GRIFFIN: If the Court please, I do have some photographs of Engine 2500 which I will deliver to Mr. Collins. I had four but one is missing from last time. It should be understood that these were taken at some subsequent time, and certain conditions were changed for the purposes of photographic evidence.

THE COURT: What do you need?

MR. COLLINS, SR.: I was going to mark this one Number 1, your Honor.

(Thereupon photograph referred to was marked Plaintiff's Exhibit 1 for identification.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, referring to June 21, 1971, do you remember what locomotive you were operating on that night?

A. N&W 2500.

Q. N&W, what does that indicate?

A. Norfolk & Western.

Q. Before we get into that, could you tell me how it came about that you were operating a Norfolk & Western engine

when you were employed by the Erie Lackawanna?

A. Well, there was a joint agreement between the two railroads, a consolidation. They both used the Bison Yard. They had an agreement, whatever it may have been, to use this yard, both railroads used this yard.

Q. The Bison Yard, where is that located?

A. That is located in Sloan, New York, Sloan and Cheektowaga.

Q. Generally which direction does that yard run?

A. It runs generally in an east and west direction.

Q. And you say that the Norfolk & Western and the Erie Lackawanna had an agreement whereby they both used that yard?

A. Yes.

Q. Did they have Norfolk & Western crews working in the Bison Yard in 1971?

A. Yes, they did.

Q. And Erie Lackawanna crews also worked in that yard?

A. Yes.

Q. What kind of yard is the Bison Yard?

A. It is basically used for switching purposes, for classifying cars. They call it the hump yard, but it is used for classifying, switching, making up trains more or less.

Q. By "classifying," would you tell us what that means?

A. That means making up a train, such as would be going easterly from Buffalo to Binghamton, they would put cars that would be dropped off possibly in Attica, New York, they would be

on the headend, and maybe the next drop would be in Hornell, those cars would be next, and then the cars for Elmira would be next, and then the remainder of the train for Binghamton would be the rearend, that is classifying.

Q. And would that be known as a receiving yard also?

A. Yes.

Q. By "receiving," what do they mean by that?

A. Receiving trains coming from whatever direction.

Q. They break the trains up and classify the cars and send them to where they are going?

A. Yes.

Q. If you had ten cars going into a certain railroad they would go on one track and be taken over there?

A. Yes.

Q. These trains going down toward Attica and that direction, is that considered a road job?

A. That would be a road job, yes.

Q. And do they have different type of engines for operations on the road than they do for the yard?

A. Yes.

Q. What is the difference in the road engine, just generally, from a yard engine?

A. Well, they are usually larger and some of them have more trucks, in other words, more wheels underneath them for more traction because they are more powerful, they have

more horsepower, and to get the power to the rails they need more wheels.

Q. N&W 2500, that is the engine you used on June 21, 1971?

A. Yes, it is.

Q. And had you used that engine prior to that date?

A. Yes.

Q. By the way, what day of the week was June 21, 1971?

A. I believe it was a Monday.

Q. And do you recall when you had worked on this N&W 2500 prior to that?

A. I believe that was the Saturday preceding that Monday.

Q. Do you recall what shift you worked on that Saturday?

A. 10:30 P.M. to 6:30 A.M.

Q. Was it six thirty on Sunday morning that you finished your tour of duty?

A. Yes.

Q. Then you were called again for the utility job and to use N&W 2500 on the 21st, is that correct?

A. Yes.

Q. Now I show you Plaintiff's Exhibit 1 marked for identification, and ask you if you can identify this engine that is in the picture?

A. Yes, I can identify it.

Q. What is that?

A. That is the N&W 2500.

Q. Is that the engine that you were using on June 21, 1975?
A. Yes.
Q. Excuse me, 1971?
A. Yes, sir.
Q. Now, referring to this picture, I see on the left side of the picture there is a ladder going up to the end of the engine?
A. Are you referring to this?
Q. Yes.
A. Yes.
Q. What would you classify that end of the engine as, the front or the rear?
A. That is the front.
Q. Then in this picture there is sort of a hood up on the front, do you know what that hood encases?
A. Well, it encases a room that can be used for steam generators if it would be used in passenger service. It is basically a road engine, but they were not equipped with steam generators, I guess they were not used in passenger service, although there is a concrete block in some of these. The concrete block is more or less for weight.
Q. Just in front of that there is a protrusion, sort of a cab, could you tell me what that is?
A. I don't understand.
Q. This protrusion just behind the enclosure that you said

should enclose the steam equipment, what is that?

A. That is the entrance to the cab.

Q. And as we are looking at the engine, are we looking at the left side of the engine?

A. Yes, we are.

Q. So that would be the fireman's side?

A. Yes.

Q. And the engineer is usually on the right side?

A. Yes.

Q. Is that the way all American engines are built?

A. Well there are dual control engines, they are no longer built, which could be operated from either side.

Q. This engine, do you know the manufacturer of this engine?

A. That is a General Motors diesel.

Q. You don't know the horsepower?

A. No, I don't.

MR. COLLINS, SR.: May I offer that in evidence, your Honor.

THE COURT: You may.

MR. COLLINS, SR.: May I show it to the jury?

THE COURT: Wait a minute, it is not in evidence.

MR. GRIFFIN: No objection.

THE COURT: All right, it is in evidence.

(Thereupon Plaintiff's Exhibit 1, previously marked for identification, was received and

marked in evidence.)

THE COURT: Now the jury may see it.

(Thereupon Plaintiff's Exhibit 1 in evidence was displayed to the jury.)

BY MR. COLLINS, SR.:

Q. Now, other than on the 19th of June 1971, had you worked this particular engine, to your knowledge, prior to that?

A. Not that I can recall.

Q. And on the 19th, that Saturday night that you went to work, do you recall the fireman who worked with you on this engine?

A. Yes, Harlock.

Q. Do you know his first name?

A. Thomas.

Q. Thomas Harlock?

A. Yes.

Q. How long had Mr. Harlock worked on the railroad in 1971, if you know?

A. I don't know.

Q. Is he younger in senority than you?

A. Yes.

Q. Is he classified as a fireman?

A. He was a fireman at that time, yes.

Q. Was he a promoted engineer at that time?

A. I'm not certain.

Q. How old a man was Mr. Harlock?

A. I don't know how old he is.

Q. Your best estimate, was he in his thirties, forties?

A. I would say maybe his late thirties.

Q. And did Mr. Harlock, to your knowledge, have any other occupation other than the railroad on that date?

MR. GRIFFIN: Well, I fail to see the relevance of whether Mr. Harlock, who is on some other trip with him, had some other occupation.

THE COURT: Sustained.

BY MR. COLLINS, SR.:

Q. Do you recall working that night, the 19th, a Saturday night?

A. Yes.

Q. Do you recall Mr. Harlock being there?

A. Yes, I do.

Q. Did you allow Mr. Harlock to run the engine on that night?

A. No, I did not.

Q. Who ran the engine on the 19th?

A. I did.

Q. Did you have an occasion to use the fireman's side of the engine on the 19th?

A. No, I did not.

Q. Was there any reason that you did not allow Mr. Harlock to work the engine on the 19th?

A. Mr. Harlock has other employment and --

THE COURT: All that is pertinent is that he did not run it that night, you did run the engine, is that correct?

THE WITNESS: Yes, I run the engine.

THE COURT: Mr. Collins, that is all that is pertinent?

MR. COLLINS, SR.: Yes.

THE COURT: All right.

BY MR. COLLINS, SR.:

Q. You ran the engine exclusively on the 19th of June 1971?

A. Yes, I did.

Q. Did you ever sit on the fireman's side on that night?

A. No.

MR. COLLINS, SR.: Now, we subpoenaed a diagram of the yard, and we had better mark this Plaintiff's Exhibit 2.

(Thereupon diagram referred to was marked Plaintiff's Exhibit 2 for identification.)

MR. COLLINS, SR.: I would request Mr. Griffin to stipulate that that is a diagram of the Bison Yard,

encompassing Halstead Avenue, at least as of November 7, 1969, revised date.

MR. GRIFFIN: That is true.

MR. COLLINS, SR.: I would offer this in evidence, your Honor.

THE COURT: There has been an offer, Mr. Griffin.

MR. GRIFFIN: No objection. I assume the sole purpose is for the general layout of the tracks?

MR. COLLINS, SR.: That is what it is for.

THE COURT: All right, Plaintiff's Exhibit 2 received in evidence.

(Thereupon Plaintiff's Exhibit 2, previously marked for identification, was received and marked in evidence.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, showing you Plaintiff's Exhibit 2 in evidence, I ask you if you can recognize this diagram as a diagram of trackage, and so forth, that was known as the Bison Yard in June of 1971?

A. Yes.

Q. And pointing to the direction indicator, north would be at the bottom of the board?

A. I believe so.

Q. Well, pointing to this direction indicator, they have the

arrow pointing in this direction. Could you tell me -- do you want to get down and look at this and see if you can figure which would be north?

A. Well, yes.

MR. COLLINS, SR.: Mr. Griffin, would that be due north? I imagine it would.

MR. GRIFFIN: What is the right side, is that the east end of the yard?

MR. COLLINS, SR.: This is the north, this would be west, this would be east, this would be south.

THE COURT: So it would be upside down?

MR. COLLINS, SR.: Yes. We can turn it around.

THE COURT: Let the witness look at it and see if he can orient it.

THE WITNESS: I think it probably should be turned around so I can understand it.

BY MR. COLLINS, SR.:

Q. All right. Mr. Eggert, do you want to stand back, you can use the pointer if you want, so the jury and the Judge can see, too, if possible. What street runs parallel and north of the Bison Yard, what large street?

A. Halstead Avenue.

Q. No, I am saying parallel to it, that would be --

A. Parallel, Broadway.

Q. Does Halstead show on that map?

A. Yes, it does.

Q. Where is Halstead Avenue?

A. This street right here.

Q. Does Halstead Avenue run into Broadway?

A. Yes.

Q. Whereabouts? If you were to mark an X, would you just approximate where it would run into Broadway?

A. I don't understand this map, this says north and wait a minute -- I don't understand this map, I don't understand the layout of it.

Q. There is an office building here, Halstead Avenue, could you describe that office building?

A. Undoubtedly that is the Halstead Office at Halstead Avenue.

Q. Yes. That is the yard office?

A. Yes.

Q. Then the Bison Yard generally would lay east of it or is that your --

A. East of Halstead Avenue, yes.

Q. So then if we had the map marked this way, this would be north, this would be east --

A. I'm sorry, did you say was the office north or east of Halstead?

Q. No, I said is it generally located near Halstead Avenue?

A. Yes, it is.

Q. And in which direction is it from Halstead?

A. It is west.

Q. West of Halstead Avenue?

A. West of Halstead Avenue.

Q. Is there any other streets on that map that you can acclimate yourself by? There's Lovejoy up here, and Courier Street. You can tell me from your own knowledge which direction is which on that map, we don't have to go by the arrow.

A. I'm not absolutely certain. It just says office building, none of these tracks are marked as I would know them. These tracks are marked. Undoubtedly the engineers would know.

Q. Do you know where Lovejoy Street is?

A. This is Lovejoy, according to this map.

Q. In which direction is that from Halstead Avenue?

THE COURT: Is the map at all pertinent to your presentation?

MR. COLLINS, SR.: I think it is, your Honor, if we can locate the track.

THE COURT: Why is that pertinent?

MR. COLLINS, SR.: There is a question as to which direction the track bends in.

THE COURT: He knows which direction it runs in?

MR. COLLINS, SR.: Yes.

THE COURT: He can state it, I think the jury can get the particulars described to them, I don't

think they need the map.

THE WITNESS: According to this, the way you had it at first would be right, because Sloan would be here, Cheektowaga would be here, the Halstead Avenue end of the yard is in Sloan, the other part of the yard, the other end of the yard is in Cheektowaga, so this map should be reversed.

BY MR. COLLINS, SR.:

Q. We will try and get along without that map. Maybe you can describe to us the layout of the yard. Now, Broadway you have testified runs east and west?

A. Yes, it does.

Q. And east would be toward Cheektowaga?

A. Yes.

Q. West toward Buffalo?

A. Yes.

Q. Generally how does the yard run, does it run in an easterly and westerly direction?

A. Yes, it does.

Q. When you went to work on the night of June 21, 1971, what time did you report at Halstead Avenue?

A. 10:30 P.M.

Q. At Halstead Avenue, that is a yard office you reported to?

A. Yes.

Q. Who was in the yard office that was to work with you at that time?

A. The fireman and the three men that would work on the ground.

Q. What was the fireman's name?

A. William Kendall.

Q. Do you know the ground crew, do you know the members of the ground crew?

A. Brand was the conductor.

Q. His first name was William?

A. I believe it is.

Q. Did you meet with Mr. Brand and Mr. Kendall at that time?

A. Yes.

Q. Were you informed that you were to take a certain engine?

A. Yes.

Q. What engine were you given that night?

A. N&W 2500.

Q. Where was that engine located?

A. That engine was located -- I am quite certain it was south of the Halstead Yard Office.

Q. By the way, what time did you report to work?

A. I reported to work at 10:30 P.M.

Q. It was a Monday evening?

A. Yes.

Q. At that time what type of --

THE COURT: I thought the 22nd was a Monday.

MR. COLLINS, SR.: No, the 21st was a Monday, your Honor.

THE COURT: Didn't you say before the 22nd was a Monday?

THE WITNESS: I went to work on the 21st, the Monday, and finished on the 22nd.

THE COURT: The 21st was a Monday, all right.

BY MR. COLLINS, SR.:

Q. At that time were you working any special job or regular job?

A. No.

Q. How did you happen to report to this job?

A. was called from the engineers' extra list.

Q. Who called you, do you remember?

A. The caller, I couldn't tell you the man's name.

Q. How are you actually called?

A. Well, the engineers' extra list is run on a first in first out basis, and all extra work is given to the extra list, and it is required that a man is taken from the extra list at the top, he is used on the job, then you move up, and eventually you take your turn and cover some job, and when you are done you go to the bottom on that list, and rotate like that.

Q. You keep going around, you have no control over what job you are going to work actually unless there were more than one job they called you for?

A. No, I have no control over that on the extra list, no.

Q. If you had more than one job opening you would have a choice?

A. No, you go where they call you.

Q. They tell you where to go?

A. Yes.

Q. So then you were told to report there, and you said the engine was located near the Halstead Yard Office?

A. Yes, it was.

Q. Whereabouts, do you recall?

A. I believe it was south of the Halstead Yard Office.

Q. Do you remember what track it was on?

A. If it was south of the Halstead Yard Office it would have been on what they call 28 or 29.

Q. What direction would the front end of the engine -- I understand from this picture the small nose is the front of the engine, is that right?

A. Yes.

Q. In what direction would the small nose be pointing to, in which direction would it be facing when you reported to work on that night?

A. West.

Q. And do you recall whether it was facing west when you worked on the 19th on the same engine?

A. No, I don't.

Q. Then did there come a time that you and Mr. Kendall went

out to the engine?

A. Yes.

Q. What happened then?

A. Well, we inspected the engine. I walked around the engine and make sure all grab irons, which are railings that help you board the engine, they are all intact and in good shape, and inspect the running gear, piston travel for the brake shoes, this type of thing, just a general checking around to make sure that everything is more or less in order.

Q. Do you do that with the aid of a light at night or can you do it with the lights in the area?

A. You can see fairly well with the floodlights in the area.

Q. After inspecting the engine did there come a time you go into the cab?

A. Yes.

Q. Did you and Kendall go into the cab?

A. Yes.

Q. Could you describe the inside of the cab in which you worked, as far as what side of the cab the engineer sits on and what is located there?

A. Well, the engineer sits on the right side, and the fireman sits on the left side.

Q. If the engine were facing west, as you stated, the engineer would be on what side of the engine?

A. On the right side.

THE COURT: You said you didn't remember which way it was facing?

THE WITNESS: No, the engine was facing — I don't remember on the 19th, your Honor.

THE COURT: I see.

MR. COLLINS, SR.:

Q. On the 21st it was facing west?

A. Yes.

Q. You said the engineer would be on the right side, geegraphically what direction would that be?

A. North.

Q. And the fireman?

A. On the south side.

Q. Do you recall what instruments were on the N&W 2500 that night on the engineer's side?

A. You've got your gauges that refer to all of your air and your electrical system of your diesel engine. There are numerous gauges, something like the cockpit of an airplane. Then you have brake valves, engine brake valves, which they call an independent valve, which just brakes the engine, stops the engine. Then you have the automatic brake valve, which is used for the purpose of controlling a train or for an emergency application.

Q. These brakes, they operate on air?

A. Yes, they do.

Q. You have taken courses in that?

A. Yes.

Q. Would you describe what the procedure is when you apply air?

A. Well, it goes to the atmosphere and it leaves the reservoirs -- in all cars -- it goes to the atmosphere and in turn this puts the shoes against the cars, the shoe against the wheel of the car, and causes a stopping motion.

Q. You said you had one brake, the automatic brake control, that controlled the air in the train as you were connected to it by air hoses?

A. Yes.

Q. The other one was just for controlling the brakes on the engine?

A. Yes.

Q. Did they have any type of device on the fireman's side for control of the air?

A. Yes, they did.

Q. Did they have it on this N&W 2500?

A. Yes.

Q. What type of device is that?

A. Well, it's called the emergency brake valve, and it consists of on this particular engine an angle cock which you would open up, and in an emergency it would let the air to

the atmosphere, and you would gain the same result as if you did this with the automatic brake valve or the engine brake, for that matter, stop the locomotive.

Q. The brakes would go on?

A. Yes.

Q. And is that there for a particular purpose?

A. As a safety precaution.

Q. The fireman is to use that in case of an emergency?

A. Yes, if he sees fit to.

Q. They call that the emergency brake valve?

A. Yes.

Q. If he sees fit to, what do you mean?

A. If there should be an emergency arising or something he felt should be stopped -- the locomotive or train, whatever, should be stopped, he would apply this.

Q. And do all locomotives used by the Erie Lackawanna and the Norfolk & Western have these emergency brake valves?

A. Yes, they do.

Q. They are on the fireman's side?

A. Yes, they are on the left side.

Q. Are they all in the same location?

A. No.

Q. Following June 21, 1971, did you take pictures of engines that were in use on the Erie Lackawanna or the Norfolk & Western?

A. Yes, I did.

Q. Were you able to locate N&W 2500?

A. No, I wasn't.

Q. And during that time did you take pictures of the emergency brake system on a certain locomotive?

A. Yes, I did.

Q. Referring to Plaintiff's Exhibit 5 for identification, I ask you if you can tell me what type of engine this was, this emergency brake system was on?

MR. GRIFFIN: If the Court please, I object to having photographic evidence in testimony relative to all sorts of different types of locomotives. I don't see how this is pertinent.

THE COURT: We don't know if this is a different type yet.

MR. GRIFFIN: I presume that was what counsel was about to ask.

BY MR. COLLINS, SR:

Q. Do you know what engine —

A. Yes, I do.

Q. What engine was it?

A. N&W 4154.

Q. And would that system be the same as the one that was on —

THE COURT: Don't lead the witness.

BY MR. COLLINS, SR.:

Q. Could you compare this system with that that was on the N&W 2500 on June 21, 1971?

MR. GRIFFIN: If it please the Court, I think that illustrates my point. Obviously different cars -- Cadillacs have different equipment from Fords and --

THE COURT: He said compare it. If his answer is it is the same, we have one situation. If he says it is different, we have another situation. I don't yet know.

THE WITNESS: I serves the same purpose.

BY MR. COLLINS, SR.:

Q. Is that the same setup that was on the 2500 on that night?

A. No, it's not.

Q. All right. Referring to Plaintiff's Exhibit 3 for identification, I show you this, and ask you if you can identify this picture?

A. Yes, I can.

Q. What is that a picture of?

A. That is an emergency brake valve.

Q. Do you know what locomotive that picture was taken of?

A. That is from the N&W 2570.

Q. N&W 2570, would that be a 2500 series, do they classify these engines as series?

A. Yes, they do.

MR. GRIFFIN: If it please the Court, we are now going into various other things. I don't want to have to be in a position to go into other aspects of this. The H&W 2500 series covers up to the early 2500's, we are now into a 2570, which goes to a different grouping. I would be glad to get the records that would show that we are getting into a different aspect.

THE COURT: We haven't gotten into any troublesome area yet. Go ahead.

BY MR. COLLINS, SR.:

Q. Does this show an emergency brake valve system and pipes leading up to it?

A. Yes.

Q. Is that the same system that was on the 2500 the night of June 21, 1971?

A. Yes.

MR. COLLINS, SR.: I will offer that in evidence, your Honor.

THE COURT: Do you want to ask some questions?

MR. GRIFFIN: Well, if it please the Court, we produced under subpoena two photographs of the actual locomotive that this person claims he was hurt on. Now we are getting into another locomotive, 2570, and we are getting into

some detailed photographs I think that would be improper to use.

THE COURT: Is that true, you subpoenaed photographs of the 2500 engine?

MR. COLLINS, SR.: I have. I don't know when they were taken, they are inadequate to show what they are trying to portray, your Honor.

THE COURT: I don't know what they are. Plaintiff's Exhibit 3 has been offered, if you want to ask some questions, you may.

PRELIMINARY EXAMINATION BY MR. GRIFFIN:

Q. Mr. Eggert, Exhibit 3 is a picture of a locomotive, N&W 2570, correct?

A. Yes.

Q. You claim that you were involved with N&W 2500, is that right?

A. Involved? I don't understand what you mean.

Q. Well, in this case do you claim that you were hurt on locomotive N&W 2500?

A. Yes.

Q. You don't claim any injury on Locomotive 2570, do you?

A. No.

Q. When was this photograph here taken, N&W 2570?

A. I'm not certain.

Q. Did you take it?

A. Yes, I did.

Q. Was it after you started your lawsuit or before?

A. That was taken, I believe, afterwards.

MR. COLLINS, SR.: I object to that. That is immaterial as long as the p ture fairly and accurately represents the brake system on that 2500, that is all that is necessary.

THE COURT: We haven't reached that point of knowing if it is true.

MR. GRIFFIN: I object, your Honor, it is another locomotive which wasn't —

THE COURT: The essence of the problem, though, Mr. Griffin and Mr. Collins, is whether what is shown in Plaintiff's Exhibit 3 fairly shows the physical setup that was found in 2500 on the night of June 19th and the morning of June 22, 1971, and Mr. Eggert has approached it in a broad brush fashion, that is why I invited you to cross examine if you wanted to, and nothing seems to come out of that that shows it is different physically.

BY MR. GRIFFIN:

Q. Let me ask you this question. Is it your testimony that

the position of the angle cock and the brake valve in Exhibit 3 is precisely the same position that you claim the brake valve and angle cock was on --

MR. COLLINS, SR.: I object to that. We didn't offer it for that. We offered it for the purposes of showing generally what the --

THE COURT: We are dealing with sematics, involved in sematics. Whether you want to know precisely or generally, I don't know. Generally may not be sufficiently close for the jury to see it.

BY MR. GRIFFIN:

Q. Doesn't this photograph show an apparent bending away from the bulkhead of the two pipes leading to the brake valve?

A. Yes, it does.

Q. Would you please show that to Judge Elfvin? That is on another locomotive, right?

A. Right.

THE COURT: 2570.

BY MR. GRIFFIN:

Q. You have made no claim in this case on the 2500 that the angle cock and pipes were bent away from the bulkhead?

A. They are bent away from the bulkhead.

Q. You haven't made a claim in this case that the angle cock and the pipes are bent away from the bulkhead, have you?

A. There would be no way of getting your hands on it if they weren't.

Q. There is a space between the side of the engine and the angle cock?

A. Yes.

Q. That space is sufficient to get one's hand around the lever so that you can operate that brake valve, is that correct?

A. They are bent out, yes.

Q. And this one appears to be bent out quite a distance, is that true?

A. No, I wouldn't say that.

MR. GRIFFIN: Your Honor, on the basis that there is no evidance that the positioning with respect to the bending out on that locomotive was the same on 2500, that is why I think —

THE COURT: He says flatly that it is. Did I understand you to say that?

THE WITNESS: Yes, your Honor.

BY MR. GRIFFIN:

Q. Mr. Eggert, are you now swearing that the distance out from the side of the locomotive, the left side, and the way the pipes are bent on this locomotive 2570, is the same as it was on the N&W 2500 on the night that you claim you were hurt?

A. Yes, basically they are the same.

Q. I'm not saying whether it is the same device, I am saying was it beat out as much as this one that you claim here?

A. Yes, I would say so.

Q. You remember that, is that right?

A. Yes, I do.

Q. How do you remember that?

A. I hit my knee on it.

Q. That is the basis, you claim you hit your knee on it, so therefore it is the same?

A. They are all basically the same.

MR. COLLINS, SR.: Your Honor, he will have a right to cross examine. I think we have a right to offer that, and let Mr. Griffin get up when it is his turn.

THE COURT: Finish your answer.

THE WITNESS: They are all basically the same. They were installed basically the same. Now, they could vary in a matter of --

THE COURT: The only question is, you were in the cab of Engine 2500 at the time the incident occurred, you were in there on one prior occasion, is that true?

THE WITNESS: Yes.

THE COURT: You took this picture at some later point in Engine 2570?

THE WITNESS: Yes.

THE COURT: The only question is is what we see in Plaintiff's Exhibit 3 a fair representation of the arrangement in 2500 on June 22, 1971?

THE WITNESS: Yes, it is, your Honor.

THE COURT: All right.

MR. COLLINS, SR.: I offer it in evidence.

THE COURT: All right, any objection?

MR. GRIFFIN: Yes, your Honor, I object. It is a different locomotive, taken a considerable period later in a remote fashion.

THE COURT: I will overrule the objection, I will receive Plaintiff's Exhibit 3 in evidence.

(Thereupon Plaintiff's Exhibit 3, premarked for identification, was received and marked in evidence.)

MR. COLLINS, SR.: May I show it to the jury, your Honor?

THE COURT: Yes.

(Thereupon Plaintiff's Exhibit 3 marked in evidence was displayed to the jury.)

THE COURT: All right, Mr. Collins. Hand Plaintiff's

Exhibit 3 to the witness again, will you? Hand that exhibit to the witness. What is not clear, at least it wasn't exactly to me, and it may not be to the jury, which is the bottom or floor?

THE WITNESS: The tab, the tab would be the floor.

THE COURT: Hold it toward the jury. That is the position that it should be viewed in, ladies and gentlemen, with that tab at the bottom. All right, go ahead.

BY MR. COLLINS, SR.:

Q. Referring to Plaintiff's Exhibit 3 in evidence, there is a pipe running from this valve going down toward the bottom of the picture?

A. Yes.

Q. And that pipe eventually would go -- would that go into the floor of the cab of the engine?

A. Yes, it would.

Q. Now, Mr. Eggert, you worked on that railroad and worked on various engines that have these safety valves on them, is that true?

A. Yes.

Q. And as far as the location of the valve on that N&W 2500, could you tell me where that was located in the cab?

A. I'm sorry, would you repeat that?

Q. Could you tell me where the valve itself and the pipes leading up to it were located on the 2500 on June 21, 1971?

A. Here on the left side, toward the front door, toward the front of the cab of the locomotive. They would be in front and to the left of the two seats that are on the left side of this particular locomotive.

Q. So it would be up in front of the seats that are located on the fireman's side?

A. Yes.

THE COURT: We will take a ten minutes recess at this time, ladies and gentlemen.

(Thereupon the court was in recess at 2:40 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 2:50 P.M.

(Jury present.)

THOMAS WILLIAM EGGERT, called as a witness in his own behalf, and having been previously duly sworn, resumed and testified further as follows:

MR. COLLINS, SR.: Would you mark that?

(Thereupon photograph referred to was marked Plaintiff's Exhibit 25 for identification.)

DIRECT EXAMINATION BY MR. COLLINS, SR. (Cont'd.):

Q. Mr. Eggert, I show you Plaintiff's Exhibit 25 for identification, and I will inform you that this is a photograph supplied by the defendant of N&W 2500.

THE COURT: So stipulated, Mr. Griffin?

MR. GRIFFIN: Yes.

BY MR. COLLINS, SR.:

Q. And I ask you if you can identify the picture?

A. That looks like the N&W 2500, yes.

Q. Other than this, I don't know if it is a camera case or what it is in the front, is that a fair and accurate representation of the emergency brake valve on the fireman's side as it existed on June 21, 1971?

A. Yes, it is.

Q. And as far as the seats that are in the photograph, is that a fair and accurate representation of the seats as they existed on June 21, 1971?

A. No, it is not.

Q. What is the difference?

A. There is one seat missing.

Q. What seat is that?

A. The front seat.

Q. Mark under the position where that front seat should be an X on that photograph.

A. Yes.

THE COURT: This would be where the pedestal of the seat hits the floor?

MR. COLLINS, SR.: The pedestal is there, the seat is taken off, your Honor.

THE COURT: I see.

THE WITNESS: I will put an X where the center of the seat would be.

MR. COLLINS, SR.: All right. I will offer that in evidence.

MR. GRIFFIN: No objection, your Honor.

MR. COLLINS, SR.: It is my understanding --

THE COURT: All right, Plaintiff's Exhibit 25 is in evidence.

(Thereupon Plaintiff's Exhibit 25, previously marked for identification, was received and marked in evidence.)

BY MR. COLLINS, SR.:

Q. This photograph shows the pipe and the safety device but the front seat has been removed?

A. Yes, it is removed.

THE COURT: At any rate, it is not there?

THE WITNESS: It is not there, no.

BY MR. COLLINS, SR.:

Q. Of course, you don't know when this photograph was taken?

A. I have no idea.

MR. COLLINS, SR.: May I show this to the jury?

THE COURT: Yes, you may.

(Thereupon Plaintiff's Exhibit 25 in evidence was displayed to the jury.)

BY MR. COLLINS, SR.:

Q. Now, Mr. Eggert, I show you a photograph marked Plaintiff's Exhibit 2 for identification, and ask you if you can identify this picture?

THE COURT: Plaintiff's Exhibit 2? What is the diagram? I thought the diagram was Plaintiff's Exhibit 2?

MR. COLLINS, SR.: It should be 2 but --

MR. GRIFFIN: That must be a marking from another proceeding.

MR. COLLINS, SR.: Could we make that 4, your Honor?

THE COURT: You have already premarked something as 4. Why don't you avoid any ambiguity, you have a 2 on there now?

MR. COLLINS, SR.: Yes.

THE COURT: Add a 6 and make it 26.

(Thereupon photograph referred to was marked Plaintiff's Exhibit 26 for identification.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, referring to Plaintiff's Exhibit 26 for identification, I ask you if you can identify this photograph?

A. Yes, I can.

Q. And what does that photograph represent?

A. The N&W 2570.

Q. Does that show the seat position, the one that has been removed on Plaintiff's Exhibit 25 in evidence, does it show the seat position on that particular type of locomotive?

A. Yes, it does.

Q. Does it show the seat position as it existed on N&W 2500 on --

THE COURT: 2500?

BY MR. COLLINS, SR.:

Q. 2500 -- excuse me -- as it existed on June 21, 1971?

A. Not the position.

Q. The location?

A. The location, yes.

Q. And the object in the left hand corner, although it is dark, it shows the seat and part of the back of the seat?

A. Yes, it does.

Q. All right. Now, referring to this knob up in the front, what does that knob attach to, do you know?

A. I'm sorry, what knob?

Q. Up here in the top of the picture.

A. That is a door handle.

Q. Does that open a door?

A. Yes, it does.

Q. Where does that door lead to?

A. That door leads out of the cab, along the catwalk.

Q. On the fireman's side?

A. On the fireman's side.

MR. COLLINS, SR.: I will offer that in evidence, your Honor.

MR. GRIFFIN: If it please the Court, I would again object. We have a totally different engine, the doors are different, the seats are different. I would ask the Court to compare the previous picture of Engine 2500 plus this additional photograph, which we made available of 2500, which illustrates the differences and --

MR. COLLINS, SR.: What is the difference?

MR. GRIFFIN: Where is -- may I have Exhibit --

THE COURT: 25?

MR. GRIFFIN: Yes, the one that doesn't have the seat.

MR. COLLINS, SR.: Right there.

MR. GRIFFIN: May I show them to the Court? The door

handles are in a different position.

THE COURT: Hand them to the witness, and he will hand them to me.

MR. GRIFFIN: Yes, your Honor.

THE COURT: I can see, Mr. Collins, that the door handles are differently arranged. Is that any matter of any pertinency? I notice you bring it up.

MR. COLLINS, SR.: No, I just want to show that there was a door there leading out on the catwalk.

THE COURT: All right. Regardless of where the handle is, is the door in the same position?

THE WITNESS: Yes, it is, your Honor.

MR. GRIFFIN: Your Honor, may I just show the Court this additional exhibit, which shows the same thing that is purported to be shown --

THE COURT: This is an unmarked exhibit.

MR. GRIFFIN: But --

THE COURT: Put a marking on it, Defendant's Exhibit 1.

(Thereupon photograph referred to was marked Defendant's Exhibit 1 for identification.)

THE COURT: No one has said what Defendant's Exhibit 1 is a picture of.

MR. GRIFFIN: I would represent to the Court --

THE COURT: No, maybe Mr. Eggert knows, maybe he doesn't.

MR. GRIFFIN: May I show it to him? I will ask him.

THE COURT: Certainly.

MR. GRIFFIN: May I also see Exhibit 25? Thank you.

PRELIMINARY EXAMINATION BY MR. GRIFFIN:

Q. Mr. Eggert, I direct your attention to Defendant's Exhibit 1, and ask you whether that is not also a photograph of the interior of Engine N&W 2500 and the engine that you claim you had your accident on?

MR. COLLINS, SR.: Your Honor, I don't think Mr. Eggert can tell. He didn't take the picture. It may be similar --

THE COURT: I was going to rephrase that, whether or not what is shown in Defendant's Exhibit 1 fairly represents what the interior of 2500 was on June 22, 1971, with any exceptions you want to note?

THE WITNESS: This exhibit, your Honor?

THE COURT: Yes.

THE WITNESS: Yes, this is fairly accurate.

THE COURT: What differences are there, if any?

THE WITNESS: If any of the N&W 2500?

THE COURT: Yes, from what you saw and were dealing with

that day.

THE WITNESS: I would say this is a fairly accurate description.

THE COURT: Does it have both seats?

THE WITNESS: Yes, it does.

THE COURT: All right. Let me see that then, along with the other photograph, if you will. Looking at Plaintiff's Exhibit 26, which is the one which Mr. Collins showed to you, and wherein he called your attention to the door handle, was the door handle on M&W 2500 on June 22, 1971 as it is shown in Plaintiff's Exhibit 26, which you have in front of you?

THE WITNESS: The door handle?

THE COURT: Yes, or was it as shown in Plaintiff's Exhibit 25 and Defendant's Exhibit 1?

THE WITNESS: In this photo, your Honor, this would be --

THE COURT: You are pointing to Plaintiff's Exhibit 25 and Defendant's Exhibit 1, are you saying that is the way it was?

THE WITNESS: Yes.

THE COURT: All right. Mr. Collins, I don't know the relevancy of the position of the door handle.

MR. COLLINS, SR.: No, I will withdraw that on the door handle,

your Honor. There is no relevancy, I wanted to show there was a door going out in front.

THE COURT: All right. Can you agree that there was a door going out at that relative position of 2500, regardless of where the door handle was?

MR. GRIFFIN: Right, your Honor, but my point is that it is better to have the locomotive that was involved rather than a totally different one.

THE COURT: There are different details and angles shown, in other words, different items shown in Plaintiff's Exhibit 25 than are shown in Plaintiff's Exhibit 26 or Defendant's Exhibit 1. Now, if Mr. Collins thinks there is some relevancy in having the jury know about those details from those views, if they are fairly representative of what was actually present in 2500 on June 22nd, it would seem to me that should be sufficient, telling the jury that the door handle is in a different position in Plaintiff's Exhibit 25 and they should treat it on that basis.

MR. GRIFFIN: Well, your Honor, my only point is -- I don't

want to belabor this -- I don't know what contentions are going to be made later. I anticipate possible prejudice by bringing in a locomotive in a different series with a different construction of the cab than the one involved in this case, especially when we have pictures of the one that was allegedly involved. I don't see the sense of that, and I think it is unfair to the defendant.

THE COURT: Is there detail in Defendant's Exhibit 1 that satisfies your interest in that part of the interior of 2500, Mr. Collins?

MR. COLLINS, SR.: The seat is removed, that is why I brought this --

THE COURT: In Defendant's Exhibit 1 the seats are there Mr. Eggert said.

MR. COLLINS, SR.: Yes, your Honor, but I am going to object to this because it is our contention that the front seat was inoperative at the time, that it wouldn't swing around. Mr. Griffin has taken this picture to show that it will. We don't know when this was taken --

THE COURT: That is not pertinent, that aspect of the interior isn't pertinent. That will be

described by Mr. Eggert, and perhaps others, but --

MR. COLLINS, SR.: If Mr. Griffin can tell me when the pictures were taken or bring in proof, I wouldn't object to it.

THE COURT: I asked Mr. Eggert what the differences were or might be between what is shown in Defendant's Exhibit 1 and what was in 2500 on June 22nd, and he indicated that there was no difference. Do you want to supplement that, Mr. Eggert, in some fashion concerning the seats, either seat or its condition or orientation?

THE WITNESS: I don't know as I completely understand, your Honor, what you want me to do.

THE COURT: Is there anything in Defendant's Exhibit 1 that differs from what you saw in 2500 on June 22, 1971, including the position of the seat?

THE WITNESS: Yes, there is a difference.

THE COURT: What is the difference?

THE WITNESS: The seat.

THE COURT: In what way?

THE WITNESS: It has been turned around.

THE COURT: It has been turned around which way?

THE WITNESS: It has been turned around so the back rest is just about opposite of where it was at the time.

THE COURT: How, how is it shown now, toward the rear or toward the front?

THE WITNESS: Toward the front.

THE COURT: How had it been on June 22nd?

THE WITNESS: It had been toward the center of the cab, to the rear.

THE COURT: Sort of angled to the center rear?

THE WITNESS: Yes.

THE COURT: Aside from that difference, is there any other difference between Defendant's Exhibit 1 and 2500 on June 22, 1971?

THE WITNESS: Your Honor, it is hard to tell if this bracket has been moved or not. These seats could have possibly been moved.

THE COURT: What bracket?

THE WITNESS: The bracket the seat is hinged on, this could have been moved forward or aft.

THE COURT: You were there, we were not, was it or wasn't it?

MR. COLLINS, SR.: If you don't know, you don't know.

THE WITNESS: I honestly can't say, your Honor.

THE COURT: All right.

THE WITNESS: The windows are open, which the windows weren't open but -- the windows are open on these pictures.

MR. COLLINS, SR.: I am going to offer 26, your Honor, and object to Defendant's Exhibit 1.

THE COURT: Your objection is as to the door handle and, of course, there is an additional little locking feature below the door handle in Plaintiff's Exhibit 26 that isn't shown on the right on the door in Plaintiff's Exhibit 25 and Defendant's Exhibit 1, and the position of the front seat has been noted by Mr. Eggert. You are afraid there are other little areas that might be utilized or details that might be utilized later. What is it offered for?

MR. COLLINS, SR.: Number 1?

THE COURT: 26.

MR. COLLINS, SR.: To show the proximity of the seat to the pipe and the valve.

THE COURT: All right. It is offered for that purpose?

MR. COLLINS, SR.: Yes.

THE COURT: Any objection?

MR. GRIFFIN: That is my point. They've got another engine, and I knew that was what they were

offering, proximity and the angle of the photograph. I say if you look at these pictures you will see many differences, and to get involved in another locomotive of another series that wasn't involved when we are talking about what may become some relatively close issues later, in terms of who was where and doing what and what happened, physical facts, I say it is not helpful to the jury. It is possibly prejudicial to the defendant and —

THE COURT: What is your testimony, Mr. Eggert, concerning the relative distance between the front seat and the emergency brake valve as shown in Plaintiff's Exhibit 26 compared to what you saw in Engine 2500 on June 22nd?

THE WITNESS: May I see that exhibit?

THE COURT: Yes.

THE WITNESS: I would say it is approximately in the same position.

THE COURT: You say that was or was not the way it was in the 2500 on June 22nd?

THE WITNESS: I would say this was the way it was.

THE COURT: On that basis I will admit the photograph in evidence. Plaintiff's Exhibit 26 is in

evidence.

MR. COLLINS, SR.: Thank you, your Honor.

(Thereupon Plaintiff's Exhibit 26, previously marked for identification, was received and marked in evidence.)

(Thereupon Plaintiff's Exhibit 26 in evidence was displayed to the jury.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, you have worked on locomotives or engines for a number of years?

A. Yes.

Q. And you have worked on N&W engines prior to the accident and since?

A. Yes.

Q. Now, did you work on other railroads other than the -- other locomotives owned by other railroads other than the Erie Lackawanna and the Norfolk & Western?

A. Yes.

Q. Had you worked on those engines prior to June 21, 1972?

A. I believe so.

Q. Had you worked on Erie Lackawanna locomotives in the 3600 series?

A. Yes.

Q. And had you worked on Erie Lackawanna locomotives in the 1200 series?

A. Yes.

Q. And as far as the locations of this safety valve and the pipes leading up to it on the 1200 and the 3600 series, could you tell me are they located in the same position that this N&W 2500 had it located on?

A. No, they are not.

MR. GRIFFIN: I object, if the Court please, and move to strike it. The fact that other locomotives have their brakes or brake valve someplace else is not probative. There is no such contention in this case or any claim --

THE COURT: It is my understanding there is no such claim, Mr. Collins.

MR. COLLINS, SR.: I don't understand. No such claim as to what?

THE COURT: As to the positioning of the valves. I understand you have a certain specific contention concerning the valves, I don't see that it involves the position. Now, if you want to go at the other aspect, this is covered specifically, I will deal with it after I excuse the jury.

MR. COLLINS, SR.: I think we better argue this out of the hearing of the jury.

THE COURT: Go ahead with the other questions. The jury will ignore the answer that Mr. Eggert has given thus far concerning the position of the valves.

BY MR. COLLINS, SR.:

Q. Mr. Eggert, when you went to work at ten thirty on this evening of June 21, 1971, did you and the fireman reach an agreement as to who would run the engine the first part of the evening?

A. Yes, we did.

Q. And what was that agreement?

A. I told him he could run it.

Q. Is that Mr. Kendall?

A. Yes.

Q. Then did you start to work on that evening?

A. Yes, we did.

Q. Do you recall what moves you made, what type of work you were doing?

A. It was a switching operation.

Q. And by that, you were working exclusively in the Bison Yard, is that true?

A. As far as I can recall, we were in the Bison Yard.

Q. This job classification that you were on was utility?

A. Yes.

Q. What does that utility indicate, what type of work does a utility job --

A. A utility job is at the yardmaster's disposal for whatever he may want moved in the line of freight cars and whatever. You may be handling one car or several cars or you may be in a switching operation right there or in the upper part of the Bison Yard or you may be in transfer service, going to another yard with the train.

Q. So, as you recall, up until approximately two thirty what type of work did you do on that evening and the morning of the 22nd?

A. Switching locally, right there more or less in that area of the yard.

Q. Bison Yard has an eastern end and a western end, is that true?

A. Yes.

Q. The western end is down near Halstead Avenue?

A. Yes.

Q. And the eastern end extends into Cheektowaga?

A. Yes.

Q. Now, which end of the yard did you work on?

A. We were working more or less on the westerly end of the yard.

Q. Did there come a time that you were making a movement at

approximately 2:30 A.M.?

A. Yes.

Q. Who was running the engine at that time?

A. Mr. Kendall.

Q. He had acted as the engineer from ten thirty until approximately two thirty?

A. Yes.

Q. Did he continue operating the engine beyond two thirty in the morning?

A. Yes, he did.

Q. Had you operated the engine between ten thirty and two thirty?

A. No, I don't believe I had.

Q. You went up on the engine, and you were to act as a fireman for the first part of the evening?

A. Yes.

Q. What side of the engine did you go to?

A. The left side.

Q. And did you sit on the fireman's side?

A. Yes, I did.

Q. Do you recall when you went on the engine if you had any cab lights or interior lights within that cab?

A. No, there were no lights on.

Q. Do they have cab lights or did they have cab lights on the 2500 on that evening?

A. There is a cab light within the cab on that engine, yes.

Q. Where is that located?

A. I believe -- I'm not certain -- some have two, some have one -- I believe this has one in the center of the cab, in the dome on the ceiling.

Q. Who would control that light?

A. That would be controlled from the engineer's panel on the engineer's side of the cab.

Q. It would have been on Mr. Kendall's side?

A. Yes.

Q. You went over to the fireman's side, tell us what you did when you first got on the engine?

A. I first got on the engine -- well, we usually get seated and, you know, check everything, the brakes are all off, that I would have done, and I went to the left side, and I sat on the back seat.

Q. Would you describe the seats? Can we see them in one of the exhibits? There are two seats, and referring to Exhibit 25, that shows one seat, would that be the back seat on the 2500 that is shown?

A. Yes, that is the seat I sat on.

Q. That is the seat you sat on?

A. Yes.

Q. Did you sit in the front seat when you first went on the engine?

A. No, I didn't.

Q. How long did you continue to sit in the back seat?

A. No length of time at all.

Q. Why was that?

A. Because I had no leg room.

Q. Would you explain why you didn't have any leg room?

A. Because of the position of the front seat.

Q. What was the position of the front seat?

A. The front seat was cocked on an angle to the left.

THE COURT: The back was to the left or the front?

THE WITNESS: The back of the seat was to the right, it was turned counterclockwise, cocked counterclockwise, which would bring the back of the seat over this way.

BY MR. COLLINS, SR.:

Q. By the back of the seat you mean the back rest?

A. This is the wall, the bulkhead --

Q. By the back of the seat you mean the back rest?

A. Yes.

Q. What is that made of, do you know what material covers it?

A. Well, it is -- I don't believe it is leather, I think it is plastic of some sort.

Q. How about the seat itself?

A. That is structured of more or less metal, steel I guess, steel frame.

Q. And the dimensions of the seat that you sit on, do you know what they are?

A. No, I don't.

Q. You said that because of the angle of the seat or the back rest was turned toward the center of the cab, you could not stay in the back seat, is that your testimony?

A. I had no leg room, yes.

Q. And how much leg room is there between the -- was there between the first and the second seat on the M&W 2500 on that night?

A. Not enough to get my legs in there between the two seats.

Q. Had you sat on that engine on the 19th on the fireman's side?

A. No.

Q. And you say that you sat there for awhile, were you able to sit facing the front seat?

A. I could sit facing the front seat, I couldn't get my legs in where they belonged because of the bracket of the front seat.

Q. Because of the bracket?

A. The bracket of the back rest.

Q. The bracket that supports the back rest?

A. Yes.

Q. I show you Plaintiff's Exhibit 6 for identification, and ask you if this is a fair and accurate representation of

the distance between the back seat on this engine, which is EL 1241, is a fair and accurate representation of the distance as it existed on the N&W 2500 on the night of June 21, 1971?

A. Well, I wouldn't have had this much leg room on the 2500 because of the position of the back rest on the front seat, I wouldn't have had as much room.

Q. Because the seat was positioned toward the center?

A. Yes.

Q. Did you attempt to move the back rest so that it would move in either direction?

A. The back rest of the front seat?

Q. Yes.

A. Yes, I did.

Q. And how did you attempt to move that?

A. By hand.

Q. What is the usual way that it moves, if it moves?

A. It just swings.

Q. Will it swing in any direction?

A. It will swing either way.

Q. Is there any type of --

THE COURT: Swivel or rotate?

THE WITNESS: Rotate.

BY MR. COLLINS, SR.:

Q. Is there any particular locking device on there that you

have to unlock before it will rotate?

A. Yes.

Q. Where is that locking device, where was it located on N&W 2500 on that night?

A. They are located under the seat.

Q. Did you try an unlock it so that it would rotate?

A. It was down underneath, it was out because of the position of the seat, it couldn't be locked.

MR. GRIFFIN: I believe that is not responsive to the question.

THE COURT: Strike the answer. Read the question.

(Thereupon the last question was read by reporter.)

THE WITNESS: Yes, I did.

BY MR. COLLINS, SR.:

Q. What did you do in attempting to unlock it so that it would rotate?

A. Reached under the seat for the lock, pull it out.

Q. Did you reach under the seat and pull it out, the lock?

A. I reached under the seat to pull it out.

Q. Was there a lock there?

A. I don't believe there was, I didn't feel one.

Q. Then did you attempt to rotate that seat further?

A. Yes, I did.

Q. How did you attempt to rotate it?

A. By hand.

Q. And did you put pressure on it?

A. Yes.

Q. Were you able to move it?

A. No.

Q. So it stayed that way?

A. Yes, it did.

Q. All right. Now, other than that the back of this seat, which has a different type of back rest on it, and the fact that the back rest on the N&W 2500 was turned toward the center of the cab, is this a fair and accurate representation of the distance between the back seat and the front seat on the 2500, the N&W 2500, on the night in question?

A. No, I didn't have this much room.

Q. I am saying other than if the seat had not been cocked toward the center of the cab would you have had that much room?

A. Yes.

MR. COLLINS, SR.: I will offer that in evidence, your Honor.

MR. GRIFFIN: Again, your Honor, now we are into an Erie Lackawanna engine 1241, which has a different type of seat -- may I just determine

if the person in the picture is Mr. Eggert?

THE WITNESS: Yes, it is.

MR. GRIFFIN: I just say we are again going far afield from the locomotive that we had on the night of the accident.

THE COURT: I understand it is being offered for the sole purpose of showing the distance that would have existed between the two seats on the 2500 on June 22nd?

MR. COLLINS, SR.: Yes, your Honor.

THE COURT: Do you want to ask him any other questions?

MR. GRIFFIN: No, your Honor. It is another locomotive, and they can say it is approximately this or approximately that, but you look at it and you have different seats. He can say what he wants to say, the picture speaks for itself, you have different seats.

THE COURT: How are the seats?

MR. GRIFFIN: All you have to do is look at the pictures.

THE COURT: Are the seats different, Mr. Eggert?

THE WITNESS: Basically they are not, no.

THE COURT: Is the conformation and size of the seat the same?

THE WITNESS: The size of the seats are the same, yes.

THE COURT: The size of the actual seat portion is the

same?

THE WITNESS: Yes.

THE COURT: The back is the same?

THE WITNESS: No, the back is constructed a little bit differently.

THE COURT: How is it different?

THE WITNESS: The back on the N&W is longer, it goes down further on the bracket, there is more back rest.

THE COURT: It hits higher on a person's back?

THE WITNESS: On the N&W it would hit -- you would have a protected area lower. I would say --

THE COURT: Is it below the level of the seat?

THE WITNESS: No, not below the level of the seat, it would be up above that. The back rest on the 1200 series would be approximately in height maybe eight --

THE COURT: Let me see Defendant's Exhibit 1, Plaintiff's Exhibit 26 and Plaintiff's Exhibit 6.

THE WITNESS: Do you have Plaintiff's Exhibit 26?

THE COURT: Give me 25, I'm sorry. All right. The conformation of the back rest portion of the seat does come to be a matter of critical concern in the lawsuit, Mr. Collins, and what is shown in Plaintiff's Exhibit 6 is

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a completely different conformation of the back rest so I will sustain the objection.

MR. COLLINS, SR.: Your Honor, it isn't a question of the contour of the back rest, it is a question of those pipes that stick out.

THE COURT: Mr. Eggert testifies they are the same in both. They are not, quite obviously they are not, are they, Mr. Eggert, the supporting members for the back rest, are they the same?

THE WITNESS: No, they are not the same.

THE COURT: All right, I will sustain the objection.

BY MR. COLLINS, SR.:

Q. Mr. Eggert, referring to Defendant's Exhibit 1 in evidence, I will ask you if you can tell me approximately from that photograph the distance between the rear seat on the N&W 2500 and the front seat, the one that wouldn't move on the night of June 21-22?

A. I would say approximately five inches.

Q. How tall are you, Mr. Eggert?

A. Six foot.

Q. Do you know your leg length?

A. No, I don't.

Q. When you have pants made do you know the inner-seam?

A. Thirty two.

Q. And you sat in this seat and attempted to put your knees

and your legs between the back and the front seat on that night?

A. Yes.

Q. And you say you couldn't do it, the seat was cocked to the center?

A. Yes.

Q. The center of the cab?

A. Yes.

Q. Mr. Eggert, had you been able to turn the front seat on the N&W 2500, if you had been able to rotate it, which direction would you have rotated it?

A. I would have rotated it undoubtedly counterclockwise.

Q. To which position would the back rest be after you had rotated it?

A. Either to the side or all the way around, the furthest point away from me.

Q. Referring to the side, which side do you say it would have been -- the back rest would have been facing or would have been up against?

A. It would have been in either three positions, just so it wasn't in front of my legs.

Q. And had you rotated the back rest, what would have happened to the bars that supported the back rest?

A. They would have been out of the way.

Q. And do you know how much leg room you would have had then

had you been able to rotate this seat?

A. Well, it would give you two or three inches more.

Q. Was that customary for you to sit in the back seat?

A. Yes.

Q. As a fireman?

A. Yes.

Q. And what is the purpose of that front seat in the N&W 2500?

A. Well, on the road -- that is a road switcher -- on the road there is usually a trainman in the cab, what they call the headman, he rides in the front cab.

Q. That is the brakeman usually sits there?

A. The brakeman sits in the third seat.

Q. Now, I believe there was some discussion as to how many employees were on the 2500 on this night. Do you recall whether there was anybody other than you and Kendall in the cab of that engine?

A. There was previous to the accident, yes.

Q. Do you remember who it was?

A. No, I don't, I don't recall which one of the ground crew it was.

Q. It was one of the brakemen that was working the utility job with you?

A. Yes.

Q. Now, when you couldn't swing the seat, did you attempt to force it in any way?

A. Yes, I did.

Q. Did you use any type of instrument to force it?

A. No, not at that time.

Q. Did you have any tools on the 2500 on that night?

A. They were not all there.

Q. Which one was missing?

A. There was no hammer.

Q. And if there had been a hammer would you have used that?

A. Yes, I would have.

Q. What happened then when you couldn't turn the seat?

A. I moved from the rear seat to the front seat.

Q. And what time did you move from the rear to the front?

A. Shortly after we started work. When I couldn't do anything with the situation, I went to the front seat.

Q. You reported to work at ten thirty, what time did you start?

A. About quarter to eleven.

Q. Shortly after that you moved to the front?

A. Yes.

Q. Did you remain in the front seat of that locomotive then up until approximately two thirty?

A. Yes, I did.

Q. During this time did the ground crew switch out cars?

A. Yes, they did.

Q. Would they have been switching to the east of the engine or to the west of the engine?

A. They would have been switching east.

Q. And what side is it customary for the ground crew to stand on when they were switching cars?

A. On the enginerr's side.

Q. At that time do you know how they were passing signals, by the use of any device?

A. It was dark, by lamp and relays.

Q. Would you explain what you mean by "relays"?

A. Well, they spread out along the side of the train so they can see each other and, of course, being in view of the engineman, the person operating the engine, one man has to stay in view of him, and the rest of them spread out along the way. We call it a relay.

Q. So if you are heading west and the engineer was on the north side of the engine, the ground crew would have been on the north side?

A. Yes.

Q. Then during the course of this evening up until two thirty, did you have to relay signals or do anything as far as relaying them to the engineer?

A. No.

Q. Had there come a time between ten thirty and two thirty that the ground crew crossed over to the southern side of the train so they would have had to pass signals to you?

A. No.

Q. At approximately two thirty did there come a time that Mr. -- excuse me -- that you were still seated on the front seat of the engine on the fireman's side that you had to pass signals to the engineer?

A. Yes.

Q. Tell us of the events leading up to that.

A. Mr. Kendall asked me if I could see anyone on my side --

Q. And at that time were you making a move?

A. Yes, we were.

Q. What was the move?

A. We were moving in a westerly direction with approximately twenty cars.

Q. Where were you in relation to Halstead Avenue?

A. Approximately twenty car lengths west of Halstead Avenue.

Q. And do you know what the move was to be, were you to continue west or go back into the yard, do you know what the move was to be?

A. We were going back into the yard.

Q. You had twenty cars you were pulling west, and the ground crew was on the north side or the engineer's side of the engine, and sometime while you were pulling west the engineer asked you, Mr. Kendall asked you if you could see a signal?

A. He said he couldn't see anyone on his side, he asked me if I could see a signal.

Q. You you remember what track you were on at that time?

A. The city main.

Q. The city main, that runs across Halstead Avenue?

A. Yes, it does.

Q. Then the yard office, is that east or west of Halstead Avenue?

A. West.

Q. Halstead, is that actually a city street or an extension at the location near the yard office? Is that just an extension of a city street?

A. It is a city street I understand.

Q. Is it paved?

A. Yes.

Q. So then you pulled across that and were proceeding in a westernly direction?

A. Yes.

Q. Do you know how many cars you had?

A. Approximately twenty.

Q. So that would put you where, somewhere west of the Halstead yard office?

A. Yes.

Q. And how close is the Halstead yard office to Halstead Avenue?

A. Seventy five feet.

Q. You were twenty car lengths beyond that?

MR. GRIFFIN: Your Honor, I object to that. I think the

plaintiff ought to --

THE COURT: That is right, objection sustained.

BY MR. COLLINS, SR.:

Q. So you were pulling in a westernly direction?

A. Yes.

Q. How does the city main run after it passes the yard office and Halstead Avenue, does it run -- is it straight track?

A. No, it is not.

Q. Tell us how does it run geographically?

A. It bends to the south, it curves to the south.

Q. That would have been to the side of the train or the engine you were seated on as a fireman?

A. Yes.

Q. When Mr. Kendall asked you if you could see a signal what did you do?

A. When he asked me if I could see a signal, I was going to relay signals to him, I went to turn on the seat, I was sitting like this, the wall here, and when I went to turn I can't turn because of the back rest, I can't communicate with Mr. Kendall, my back is to him -- the problem we just had with the gentleman here -- so I went to get up so I could go to the rear seat and sit side saddle and look. I would have been -- I didn't get there -- I would have been like this, side saddle, this would have been the wall behind me, and I could have faced Mr. Kendall running the

engine and relayed the signals to him through the back window.

Q. Through the back window of the engine?

A. Yes.

Q. Would you describe that back window on the N&W 2500?

A. Well, it's approximately eighteen inches wide by twenty four inches high.

Q. Now, we don't have an inside view, but referring to Plaintiff's Exhibit 1 in evidence, the outside view of the N&W 2500, can you show the window or can you see the window on that photograph?

A. Yes, I can see the window.

Q. Could you mark that window with a W?

A. Below it?

Q. Below it.

A. Yes.

Q. Then using the picture, can you give me the approximate dimensions of the window?

THE COURT: He said about eighteen by twenty four, isn't that correct?

THE WITNESS: I said that, but I'm just -- maybe fourteen by -- it might be a little smaller, I would say fourteen by maybe twenty. Again, that is an estimate.

BY MR. COLLINS, SR.:

Q. Are those windows standard on that type of road switcher?

A. This is a General Motors car body. Yes, they are standard.

Q. Referring to Plaintiff's Exhibit 9 for identification, the EL 1241, do you know what type of engine that is?

A. That is a road switcher.

Q. And the window on that that shows in that picture, is that a window that was similar to the one -- is it a fair and accurate representation of the one that was on the H&W 2500 on June 21, 1971?

A. Yes.

Q. That would have been the window that you could have looked out to see the signal if you were sitting sideways facing the engineer?

A. Yes.

MR. COLLINS, SR.: I offer that in evidence, your Honor.

THE COURT: The window we have been talking about, this is the one that you would have looked out to see whether anyone had a signal, is this the one through which you would pass the signal to the engineer?

THE WITNESS: This is the window I would have looked through to see a signal from the ground crew. It would have been the rear window in the cab.

THE COURT: You and the engineer are in one cab, there was nothing between you and him?

THE WITNESS: Nothing outside of his control stand.

THE COURT: All right.

MR. GRIFFIN: Your Honor, we have a picture with the window of the N&W 2500. I assume that the window shown is the same, both ends of the cab on the fireman's side.

THE COURT: Is that true, Mr. Eggert? Show it to Mr. Collins.

MR. GRIFFIN: And this photograph is of another locomotive showing windows and various other things. I direct your attention to various matters that are shown in the exhibit and, of course, would not be pertinent. May I just --

THE COURT: Let me ask him -- let Mr. Collins see the picture of 2500.

MR. COLLINS, SR.: That is the outside view, it shows the window but it doesn't show what you could see looking out as Exhibit 9 does. He is in the position where he was looking out for signals, and I wanted the jury to get an idea of what he could see, the position he would have to be in to relay signals to the engineer.

MR. GRIFFIN: If it is now offered as the total scope of one's view from it, I didn't understand that, it would be objectionable, it would be

a posed picture without proper circumstances or foundation. But I think we've got the window shown.

PRELIMINARY EXAMINATION BY MR. GRIFFIN:

Q. Is it true, Mr. Eggert, that the front window is the same size as the back window on the E&W 2500?

A. I believe it is.

Q. So that the window that you have marked on this Exhibit 1, Plaintiff's Exhibit 1, would be the same window fore and aft, forward and back, other than one would be in the door, the other might not be in the door, it is the same sized window, is that right?

A. I would say so.

MR. GRIFFIN: All right. I press my objection, your Honor. I would ask that the Court view Exhibit 9 when considering this. I think the Court will find in Exhibit 9 that it is something that perhaps has been already ruled on.

THE COURT: I will sustain the objection to Plaintiff's Exhibit 9 at this time.

MR. COLLINS, SR.: Your Honor, it is four o'clock, and I think Mr. Griffin has to go to some kind of a meeting.

Discussion.

MR. GRIFFIN: It was my understanding that the work session was until four o'clock. I do have a Bar Association conference.

THE COURT: All right. We will adjourn at this time until tomorrow morning at nine o'clock, ladies and gentlemen, and again remember my admonition, you are still listening to the evidence, try not to come to any conclusions on any of the issues, and do not talk among yourselves about those issues yet and, most importantly, don't talk with anyone else or let anyone else talk with you. I will see you in the morning.

(Thereupon the jury exited the courtroom at 4 P.M.)

THE COURT: All right. We have some problems to take up in the absence of the jury. You are busy, Mr. Griffin, I know. Shall we do it at eight thirty in the morning?

MR. GRIFFIN: Well, what problems are you referring to?

THE COURT: I sustained the objection to a question relative to positioning of the emergency brake valve, and I got some indication from

Discussion.

Mr. Collins that he wanted to go into that aspect outside the presence of the jury, and we should get straightened out on what we are going to do with these photographs. We are getting into a mish-mash on it everytime something comes up.

MR. COLLINS, SR.: We are about out of photographs.

THE COURT: I would like to know what you intend to put in in the way of photographs, and get that somehow oriented, and see if we can't do away with some of these problems.

MR. COLLINS, SR.: We are about out of photographs, your Honor. I want to call your attention to the court's opinion in --

THE COURT: I have read the court's opinion.

MR. COLLINS, SR.: -- and particularly evidence of the practices of other railroads with respect to brake valve covers --

THE COURT: Covers.

MR. COLLINS, SR.: -- is highly relevant since the existence of alternatives would well --

THE COURT: Covers.

MR. COLLINS, SR.: -- is evidence as to the position.

THE COURT: The problem is that there is nothing in the lawsuit alerting Mr. Griffin to the fact

Discussion.

that this is going to be part of your lawsuit.

MR. COLLINS, SR.: The interrogatories specifically state there is a violation of the Boiler Inspection Act, and this is one of the violations.

THE COURT: Is it enumerated as being a violation?

MR. COLLINS, SR.: It is enumerated as being a violation --

THE COURT: In the interrogatories?

MR. COLLINS, SR.: -- of Section 41 or --

THE COURT: In the interrogatories?

MR. COLLINS, SR.: Yes, Article 45, Section 22.

THE COURT: Is it in your answer?

MR. COLLINS, SR.: Yes.

THE COURT: All you talk about is the lack of a valve cover.

MR. GRIFFIN: If the Court please, the context of the opinion of the Second Circuit is that there was a particular photograph to show a guard that was sustained. That is all that was before the Court, there was never anything advanced relative to positioning. There was no claim of improper design or --

THE COURT: That is not looking at the law, gentlemen, I am looking at what we have in the case, the pleadings.

MR. COLLINS, JR.: There is an allegation that that violates

the provisions of 45 United States Code 23, which is the Boiler Inspection Act, your Honor.

THE COURT: That is the one that says engine or locomotive and boiler, everything, tender and all of its equipment and pertinences?

MR. COLLINS, JR.: Yes. I have just Sherpardized the law, and the Second Circuit said any defect or foreign object or any material on an engine that causes an injury to the plaintiff is a question of fact as to whether or not it is a violation of the Boiler Inspection Act.

THE COURT: No question about it. Isn't Mr. Griffin entitled to know what we are going to have testimony about?

MR. COLLINS, JR.: Your Honor, he is, but as far as the exclusion of evidence, I know in the Second Circuit opinion there is -- they mention brake valves, but on the argument, the argument was for evidence of other positions or other things that railroads do. There is also a question of the type of engine that was used in yard as opposed to road. There's other relevant things, the safety of other railroads, how do they position a brake valve, how is it

set in the engine, is it down, is it up. That was argued to the Second Circuit.

THE COURT: Perhaps you should have amended your pleadings or answer.

MR. COLLINS, SR.: Let me give you Answer Number 7 to the interrogatories. "The seats of the locomotive cab did not swivel or turn as they should have, and the pipe and the valve and the handle of the emergency air brakes protruded out into the space which the plaintiff occupied while working in the cab." What could be more explicit than that?

THE COURT: That was mentioned in the court's opinion.

MR. COLLINS, SR.: That is our answer to the interrogatories, your Honor.

THE COURT: All right. We will deal with that in the morning and see what your position on that is, Mr. Griffin.

(Thereupon the court was in recess at 4:05 P.M.)

Transcript of Proceedings, October 6, 1976.

VOLUME II

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT,

Plaintiff,

-vs- CIVIL 73-370

NORFOLK & WESTERN RAILWAY COMPANY, and
ERIE LACKAWANNA RAILWAY COMPANY,

Defendants.

PROCEEDINGS OF OCTOBER 6, 1976

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PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:10 A.M.

(Jury absent.)

THE COURT: Now, we have been discussing the admissibility of proof relative to different positioning of this emergency brake valve, and counsel for the plaintiff's had just pointed out what is set forth in Paragraph 7 of at least one of the answers. I am looking at the answers made to the Erie Lackawanna where it said the pipes and the valve and handle of the emergency air brake protruded out into the space which the plaintiff occupied while working in the cab. I want to hear you, Mr. Griffin.

MR. GRIFFIN: In the particular interrogatory addressed to plaintiff was Number 7. "State in what respect defendant Erie Lackawanna failed to provide plaintiff with a safe and proper place to work?" That is the particular interrogatory to which Number 7 is a response. They then say that the seats didn't swivel or turn, and the pipes in the valve and handle protruded out into the space which the plaintiff occupied

while working in the cab, which means as I read that that the pipes and the valve are interfering with where he was. Now, that is an issue that he claims, but that is far different that showing or alleging an improper design, in that the engine should have had them up on the top or that they should have had them in the opposite end or in the middle of the cab. There is no allegation that the placing -- what they say is that the pipes protruded out, were bent out or protruded out into the place he was sitting.

THE COURT: They don't say they were bent.

MR. GRIFFIN: Protruded out into the space which the plaintiff occupied while working in the cab. There is no suggestion of improper design. It is saying it was out where he was working. Whether it was out where he was working or not, that is an issue, or whether he had adequate space, whether or not other manufacturers making locomotives place the emergency brake valve such as in the one picture where it sits up high or they place it up against another wall is not in this

case, never any proof of it, there is no allegation they should have placed it in a different position or improper design or that it is not in conformity with any other design. Never before was this ever advanced or suggested as a theory in this case. We have no -- a design allegation is a very specific thing. You have to have a lot of proof to meet that, bring in manufacturers and experts, and never was there any contention, never was there any pretrial statement or any suggestion that that theory would be advanced. For example, in the pretrial statement they allege the plaintiff struck left leg on unguarded emergency brake valve. They claim you can read into it not guarded, the seat was also defective since it didn't swivel, possible factual and legal issues, safe place to work, failure to install a guard on an emergency brake valve, proper maintenance of the fireman's seat, permitting the defective seat to remain, failure to inspect the engine, failure to warn the plaintiff of a dangerous condition. No place in their contentions is there anything about

using an engine with improper design or having the location not in accordance with accepted and good practice in the industry.

THE COURT: I view the pleadings and present posture of the case, particularly after remand, as putting into the case some causation, some fault on the part of the railroad for having even the emergency brake valve in this position or having it there unguarded. It would seem to me the plaintiff could take either path, of showing that it ought not to have been there or if there, it ought to have been guarded. Now, where this places you, as far as meeting that, I don't know. You are going to have to consider that and make any application to me you want to.

MR. COLLINS, JR.: If I may, plaintiff's position, and the plaintiff, as specified in the interrogatories --

THE COURT: I just ruled on it.

MR. GRIFFIN: I must say, your Honor, until I see what sort of proof the plaintiff offers and complete the cross examination --

THE COURT: Meanwhile you can be making tentative provision or tentative arrangement which might

or might not resort --

MR. GRIFFIN: I would, of course.

THE COURT: -- I will listen to any plea for a reasonable continuance if you need it.

MR. GRIFFIN: All right. I have noted my objection, there is no need to take an exception under the Federal Rules. I will consider that.

THE COURT: On these pictures, I am distressed by our inability to pin down what we are dealing with in this Engine 2500. We seem to be going all around the loop. We have pictures of other engines, and we are resorting to testimony saying, 'Well, even though this is another engine, it is about the same as the 2500 was' or we have pictures of 2500 with a changed situation. Is the proof as to what 2500 was, a pictorial proof that is not available?

MR. COLLINS, SR.: We tried -- I didn't, I wasn't involved then -- Mr. Eggert tried to obtain it and L&W 2500 was never in this area after the accident, so he didn't get pictures of it. I subpoenaed any pictures they had taken. I understood that the claim agent had taken three pictures, those are the three that are

in evidence.

THE COURT: If that is the case we'll have to go along in that posture. In connection with your proof, I imagine the only proof you have on what other valve arrangements might be is through the plaintiff, is that correct, or do you have another expert?

MR. COLLINS, SR.: Through the plaintiff.

THE COURT: All right. In that connection is it your intention to put into evidence pictures of what is found in other types of engines?

MR. COLLINS, SR.: Yes, at least two other types, your Honor.

THE COURT: All right. I would assume that would be bulwarked by sufficient foundation testimony as to his knowledge of it and also as to the frequency of situations where you find these other valve arrangements? In other words, you are prepared to indicate that this is not a single engine that has this arrangement which you are showing a picture of?

MR. COLLINS, SR.: Yes, sir.

MR. GRIFFIN: Your Honor, I have one other application, that is, there was another gentleman in the courtroom who may be called by the plaintiff to testify, Mr. Kendall, who apparently was

in the locomotive at the time. I would move to exclude that person. I have advised Mr. Collins I would do that. In fairness to the witness, it doesn't look like Mr. Collins would get to him this morning. He could be produced this afternoon. I make that application.

THE COURT: I will make a ruling that all witnesses except the parties will be excluded. All right, bring up the jury.

(Thereupon the jury entered the courtroom at 9:20 A.M.)

T H O M A S W I L L I A M E G G E R T, called as a witness in his own behalf, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: Good morning. Mr. Eggert is still on the stand. Mr. Collins?

DIRECT EXAMINATION BY MR. COLLINS, SR. (Cont'd.):

Q. Mr. Eggert, after we recessed yesterday, did you have an occasion to examine Plaintiff's Exhibit 2 in evidence, the diagram of the Bison Yard?

A. Yes, I did.

Q. And after examining it, are you able now to point out the tracks that you were using and describe the yard?

A. Yes, I am.

THE COURT: I see you have turned it over again.

MR. COLLINS, SR.: We have the north down on this side, your Honor, we did turn it.

THE COURT: Yes.

BY MR. COLLINS, SR.:

Q. Do you want to step down, Mr. Eggert? Would you point out the northerly direction on this map?

A. North would be down toward the bottom.

Q. Then the top would be south?

A. The top would be south.

Q. Then toward you would be what direction?

A. This is westerly.

Q. And you said that this yard is located in Sloan and Cheektowaga, is that your testimony?

A. Yes, it is.

Q. Now, toward the City of Buffalo would be which direction?

A. In this direction. (Indicating)

Q. So then east of the yard, what would lie east of the yard?

A. Cheektowaga and Lancaster.

Q. Now, what tracks did you testify that you were using at approximately two thirty on June 22, 1971?

A. The city main.

Q. The city main. Could you point out the city main on this diagram?

A. Yes, this is the city main, this track right here. (Indicating)

Q. That track?

A. Yes.

Q. And that curves toward which direction?

A. Toward the south.

Q. Where does Halstead Avenue cross the city main?

A. Right here. (Indicating)

Q. Could you take a marker -- can we mark that, Mr. Griffin?

MR. GRIFFIN: Yes.

BY MR. COLLINS, SR.:

Q. -- and mark with an E approximately where the engine was on the city main when this accident occurred?

A. Approximately there.

Q. Now, looking at the city main, which side of the city main were you seated on at the time when the accident happened?

A. Which side of the locomotive?

Q. Of the city main, on the track here, was it south or north?

A. I don't know as I understand your question.

Q. We are looking at the city main, you are proceeding in a westerly direction?

A. Yes.

Q. What side of the engine were you seated on at the time the accident happened?

A. I was on the south side.

Q. Would you point that out, which side that is?

A. This would be the south side. (Indicating)

Q. And the engineer, Mr. Kendall, would have been --

A. On the north side.

Q. The north side. And could you just tell me where the ground crew would have been when they were switching, approximately?

A. They would have been along in this area. (Indicating)

Q. And would you explain your movement, showing what you were going to do when you pulled up the city main?

A. We were pulling cars up the city main to come across this switch so this switch could be thrown -- this is a cross over switch -- so they could go back into the yard onto another track. These are all mechanically thrown.

Q. By "mechanically," you mean by the crewman on the ground?

A. No, sir, these are thrown by power, electrical power.

Q. But you have a man stationed there that can signal you when you pass over the switch, is that right?

A. Yes.

Q. So that you can back in?

A. Yes.

Q. And I believe you testified that he would have signaled

when you were over the switch?

A. When he wanted us to stop he would have signaled, yes.

MR. COLLINS, SR.: Your Honor, on Plaintiff's Exhibit 9 for identification, the inside of the cab, it has the rear window, have you ruled on that? You said we could offer it at a later time.

THE COURT: Later. You can reoffer it when you have other testimony in the case.

BY MR. COLLINS, SR.:

Q. Mr. Eggert, you have been running various engines, could you tell me, in addition to N&W engines, have you operated many Erie Lackawanna engines over your period as an engineer?

A. Many.

Q. And could you tell me, as far as the location of the valves on these various engines that the Erie Lackawanna has, are they always located where this one on the N&W was located, this 2500?

A. No.

Q. All right. Are they located in different positions throughout the cab?

A. Yes, they area.

Q. And how about N&W engines, have you had N&W engines where the valve is located in a different position?

A. Yes, I believe so.

Q. All right. Now, referring to Plaintiff's Exhibit 9 for

identification, can you --

MR. GRIFFIN: Excuse me, I don't want to continue to interrupt, but so that the record is clear, I object to other engines, other than the type that was being operated on the day in question.

THE COURT: All right. You may, if you want, ask the witness any questions concerning his general knowledge of different types and experience with them, if you want to do that.

MR. GRIFFIN: The only questions I would have, I would prefer to save for cross examination.

THE COURT: All right.

BY MR. COLLINS, SR.:

Q. Referring to Plaintiff's Exhibit Number 9 for identification, Mr. Eggert, did you take that photograph?

A. Yes, I did.

Q. And could you tell me of what engine that photograph is?

A. Erie Lackawanna 1241.

Q. And are you familiar with the 1241 or the 1200 series?

A. Yes.

Q. Are you familiar with that?

A. Yes.

Q. And are you familiar with the location of the fireman's safety valve on that particular engine?

A. Yes, I am.

Q. I show you this picture and ask you is there a picture of the safety valve, the fireman's safety valve, on this Engine 1241 in Plaintiff's Exhibit 9 for identification?

A. Yes, the valve is in view.

Q. Where is that located?

A. It is located on the back bulkhead or wall, and up.

Q. In relation to the valve, where would the fireman be if he were seated in his proper position?

A. If he were seated, the valve would be approximately here. (Indicating)

Q. So this differs from the N&W 2500?

A. Yes, it does.

MR. COLLINS, SR.: I will offer that in evidence.

THE COURT: You ought to have the witness mark something on there so we know what he is talking about when he says "here."

BY MR. COLLINS, SR.:

Q. Would you take the marker and circle the safety valve, the fireman's safety valve, with just an O?

THE COURT: Now, how have we marked it?

MR. COLLINS, SR.: He circled it with an O. Now I will offer it in evidence.

MR. GRIFFIN: If the Court please, I feel it is irrevelant to the issues in this case, no proper

foundation, no establishment that he worked on it, he was on a totally different engine.

THE COURT: There hasn't been a sufficient showing as to the generality of this different arrangement, the fact that this may be found in many engines, rather than just 1241.

BY MR. COLLINS, SR.:

Q. On this 1200 series, Mr. Eggert, have you observed through your years of employment as an engineer, have you observed the location of the safety valve for the fireman?

A. Yes, I have.

Q. And how is it compared to this Plaintiff's Exhibit 9 for identification?

A. Are you referring to the other 1200 series?

Q. The 1200 series.

A. Most of them -- I can't say all, I'm not certain -- most of them are located in that area.

Q. A large percentage of them?

A. Yes.

Q. You observed that through your working on these engines prior to June 21, 1971?

A. Yes.

Q. And since that time?

A. Yes.

MR. COLLINS, SR.: I will offer it, your Honor.

THE COURT: How many of those, of the engines of that series, have you worked on or have any basis for familiarity with, Mr. Eggert?

THE WITNESS: I would say probably twenty.

THE COURT: Of those twenty, do they all have this arrangement?

THE WITNESS: Well, the twenty -- I am saying it would be at least twenty engines that would have this arrangement in the 1200 series.

THE COURT: How many of the 1200 series of engines have you worked on or do you have familiarity with?

THE WITNESS: I'm sorry, would you repeat that?

THE COURT: How many of this type of engine have you worked on, the 1200 series?

THE WITNESS: Oh, I have worked on probably every 1200 that they have.

THE COURT: How many are there?

THE WITNESS: They run from 1200 to 1264. I am not --

THE COURT: You are saying there is 65 of them?

THE WITNESS: I'm not certain there are that many. They run from 1200 to 1264. I would say a safe figure would be probably fifty.

THE COURT: All right. And of those fifty how many have the type of valve arrangement shown in

Plaintiff's Exhibit 9?

THE WITNESS: I would say the majority of them.

THE COURT: What do you mean by "majority," what approximate percentage?

THE WITNESS: I would say ninety percent of them, possibly all of them.

THE COURT: All right. You are objecting to the admission of Plaintiff's Exhibit 9?

MR. GRIFFIN: Yes, your Honor.

THE COURT: I will allow it in evidence, I will overrule the objection.

MR. COLLINS, SR.: Thank you.

(Thereupon Plaintiff's Exhibit 9, premarked for identification, was received and marked in evidence.)

MR. COLLINS, SR.: May I show it to the jury, your Honor?

THE COURT: Yes.

(Thereupon Plaintiff's Exhibit 9 marked in evidence was displayed to the jury.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, have you worked on Erie Lackawanna series 3600?

A. Yes, I have.

Q. How many 3600's would the Erie Lackawanna Railroad have?

A. I'm not certain of that.

Q. Would they have more than ten?

A. Yes.

Q. Less than 100?

A. Yes.

Q. Do you know what type of engine the 3600 class is?

A. It is a road switcher.

Q. A road switcher?

A. Yes.

Q. Like the 2500 that we are referring to with the N&W?

A. Yes.

Q. And is the outer design the same?

A. No.

Q. How about the cab, do they have the fireman's safety valve in the cab of the 3600 series?

A. Yes.

Q. Through your years of experience working on the Erie Lackawanna and Norfolk & Western engines, have you observed this safety valve, the fireman's safety valve, on the 3600 series?

A. Yes.

Q. And I show you Plaintiff's Exhibit 10 for identification, and ask you if you can identify this photograph?

A. Yes, I can.

Q. Did you take that photograph?

A. Yes, I did.

Q. Do you remember when you took it?

A. Not exactly.

Q. All right. What is the number of the engine that that picture shows the interior of?

A. Erie Lackawanna 3608.

Q. And on that does it have a fireman's safety valve?

A. Yes.

Q. Could we take a pen and just again circle that safety valve?

A. Yes. (Witness marks exhibit.)

Q. All right. And the 3600 series, the number of them that you worked on, has the safety valve been in that location in all of those?

A. I'm not certain as to that.

Q. What would you say, as far as the percentage of the majority that you have worked on?

A. As a rule, when they run through a series they put them in the same place.

Q. From your own knowledge --

A. As far as I know, yes, they are all in the same area.

THE COURT: I will strike from the evidence his statement about what generally happens, and instruct the jury to ignore it.

BY MR. COLLINS, SR.:

Q. Of your own knowledge, what you remember from working there, is the safety valve, the fireman's safety valve located in this location as shown in this photograph?

A. Yes.

Q. All right. Where is that valve located?

A. That is set into the front bulkhead to the left of the door -- I'm sorry, to the right of the door.

Q. What door would that be, where would that door lead to?

A. That door leads out to the front of the engine.

Q. When you say it is set into the bulkhead, do you mean there is an indentation where that is placed?

A. Yes, there is. That is recessed.

Q. It shows in this photograph?

A. Yes.

Q. Is that as you circled it?

A. Yes.

Q. How many of those --

THE COURT: How many of these engines did you work on?

THE WITNESS: The 3600?

THE COURT: Yes.

THE WITNESS: I would say probably all of them.

THE COURT: How many are there, are you talking about twenty or was that a different figure?

THE WITNESS: Well, I would say ten, at least ten.

THE COURT: All right. You have offered them, are you objecting, Mr. Griffin?

MR. GRIFFIN: I haven't seen this picture, your Honor. Yes, again I object on the grounds that it is not relevant to any of the issues in this case.

THE COURT: No extraneous matter that concerns you?

MR. GRIFFIN: In that exhibit?

THE COURT: Yes.

MR. GRIFFIN: No, it is just another model, your Honor.

THE COURT: All right. I will overrule the objection and admit Plaintiff's Exhibit 10 into evidence.

MR. COLLINS, SR.: Thank you, your Honor.

(Thereupon Plaintiff's Exhibit 10, premarked for identification, was received and marked in evidence.)

(Thereupon Plaintiff's Exhibit 10 in evidence was displayed to the jury.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, I believe you testified that you were proceeding in a westerly direction down the city main at approximately

2:30 A.M. on June 22, 1971?

A. Yes.

Q. Do you recall the weather conditions on that night?

A. Cool, but fair, it wasn't raining.

Q. Did you have windows in the cab?

A. Yes.

Q. Were they opened or closed?

A. On the fireman's side, my windows were closed.

Q. All right. The fireman's side would be to the south, is that correct?

A. Yes.

Q. Do you recall how fast you were going as you proceeded westerly on the city main?

A. Eight to ten miles an hour.

Q. And Mr. Kendall was operating the locomotive at that time?

A. Yes, he was.

Q. Then tell us in your own words what happened?

A. Well, we were pulling cars across Halstead Avenue in a westerly direction, and as we were coming by Halstead where the crew on the ground would stop us so we could make an easterly movement, Mr. Kendall started to throttle down --

Q. You were going in this direction in anticipation of making a move back to the east?

A. Yes, and he throttled down, and he said to me, "Can you see anyone on your side?" Then I went to look to see --

Q. Before we get that far, do you remember how many cars your engine was attached to at that time?
A. Approximately twenty.
Q. And these cars, did they have brakes on them, a braking system?
A. They had a braking system on them, yes.
Q. Was that braking system in operation or in use at that time?
A. No, it wasn't.
Q. To make those brakes on the cars themselves, not the engine, operate what would the ground crew have had to do?
A. They would have had to couple the hoses between the cars, the connecting hoses, and also couple to the engine so the air compressor on the locomotive could put air back through the cars to make the brakes on the cars operative.
Q. All right. As I understand it, all of the air hoses between the cars would have had to have been connected and the air ran from the engine back through that train?
A. Yes.
Q. And on this night there wasn't air in the train itself?
A. No.
Q. All right. So then tell me what happened, go ahead, continue.
A. Mr. Kendall asked me if I could see anyone on my side. When he told me -- asked me that -- I was in my seat, and I went to turn to face him --

Q. What seat was this that you were in?

A. I was in the front seat on the left side, and when I went to turn the seat wouldn't turn, and then I started to get up so I could go to the rear seat and set sideways or side saddle so I could look back and see the signal and communicate face to face with Mr. Kendall.

Q. Now, referring to Plaintiff's Exhibit 9 in evidence, this window that we see in this photograph, would that be a window that was similar to the one that you would have been able to look through to see if there were any ground signals so that you could relay those to Mr. Kendall?

A. Yes.

Q. All right. Go ahead, Mr. Eggert.

A. As I started to get up to go to the rear seat, to go around this seat to go to the rear seat, as I got up there was a slack action --

Q. Would you explain what a slack action is?

A. A slack action is the running in or running out of the slack or space between the couplers of the cars, of each car. There is slack in between the cars and, of course, in the stopping motion everything comes forward somewhat. I would say in twenty cars you approximately have maybe thirty foot of slack that would come in, everything then would be in tight.

Q. These couplers that are attached to the cars, are they solid

or do they give in some way?

A. Well, they give. Some of them are spring loaded and others are not. There is give or slack in between the couplers.

Q. All right. Tell us about the slack action that night?

A. When I started to get up the slack came in, and when it came in it knocked me back into the back rest of the seat.

Q. What seat was that?

A. The front seat. My buttocks hit the back of the front seat, and because of the angle it threw me into the wall or bulkhead, and then I went forward and down into the brake valve, hit the brake valve, and went down in a heap on the floor.

Q. What part of your body struck the brack valve?

A. My left knee.

Q. Did you have lights on in the engine at that time?

A. No.

Q. Tell us how your knee felt when you struck this object?

A. Very painful.

Q. Could you feel the object that it struck?

A. Yes, it felt like something very sharp, very penetrating, not a blunt blow, it was a very sharp blow.

Q. Then from there you went down on the deck or the floor?

A. I went down, and I pretty nearly lost consciousness, I went down in a heap.

Q. Did you feel anything else going down or when getting up?

A. When I was getting up something snapped in my leg, in my knee.

Q. What leg?

A. My left knee.

Q. Did you say anything while you were either on the floor or after you had gotten up?

A. Yes, I used a profanity, and I said, "I hurt my knee, I have hurt myself," something to that effect.

Q. To whom did you say that?

A. Mr. Kendall.

Q. Did Mr. Kendall acknowledge it?

A. He asked me what happened. He said, "What happened?" I said, "I have hurt myself, I have hurt my knee."

Q. What did you do then after getting up?

A. I got back in the seat.

Q. What seat was that?

A. I got back in the front seat.

Q. Did the engine and the train come to a stop?

A. Yes, it came to a stop by then.

Q. What did it do after that?

A. He had the men on his side, he saw them, and he started to reverse or an easterly movement.

Q. That was approximately what time?

A. Approximately 2:30 A.M.

Q. And did you continue to work after 2:30 A.M.?

A. Yes, I did.

Q. How long did you continue to work?

A. I continued to work until we were done that morning.

Q. Did there come a time that you got off the engine?

A. Yes.

Q. What time was that?

A. It was approximately three thirty, four o'clock.

Q. Where did you go when you got off the engine?

A. The Halstead Yard Office.

Q. Were you able to get down off the engine without assistance?

A. Well, I got down, yes, without assistance.

Q. What did you have to do to get off the engine?

A. I had to go down the steps, and it was quite painful, but I went down with my good leg leading.

Q. Is there any handrails or anything to assist you going up and down those stairs?

A. Yes.

Q. All right. Did you use those?

A. Yes.

Q. This was about three thirty then that you left the engine?

A. Yes.

Q. And where was the engine located when you left it?

A. The engine was located in what they call the shop yard.

Q. It was located where?

A. In the shop yard.

Q. And is that near Halstead Avenue?

A. Yes, it is.

Q. All right. Then after you got off the engine where did you go?

A. I went into the Halstead Yard Office.

Q. Did you say the conductor's name on your job, the utility extra, was William Brand?

A. Yes.

Q. Was he in the yard office when you went to lunch?

A. I believe he was.

Q. Did you report to Mr. Brand that you had been injured?

A. No, I didn't.

Q. Did you report to anyone?

A. Yes, I did.

Q. To whom did you report?

A. I called by telephone the west end tower and talked with the yardmaster.

Q. Was there a yardmaster at Halstead Avenue at the time?

A. No.

Q. Do you remember who was in Halstead Avenue when you called?

A. No, I don't recall just who was there.

Q. You called -- where did you call?

A. The west end tower.

Q. The west end tower. Did you speak to anybody there?

A. Yes, I did.

Q. To whom did you speak?

A. The yardmaster.

Q. What was his name?

A. I'm not certain.

Q. All right. Did you make a report to him?

A. No, he referred me to the trainmaster.

Q. The trainmaster, do you remember his name?

A. It is Reich.

Q. R. W. Reich, R-e-i-c-h?

A. I believe that is it.

Q. Was he located in the same building with the yardmaster?

A. Yes.

Q. Did there come a time that you saw Mr. Reich?

A. Yes, he came right down.

Q. About what time was this?

A. Three thirty, four o'clock.

Q. Did he drive down in a vehicle?

A. I'm not sure, I imagine he did.

Q. When he got there did you have a conversation with Mr. Reich?

A. Yes.

Q. What did that conversation consist of?

A. Well, it was quite brief. He just made out an accident report, asked me what happened, and made out an accident

report.

Q. He had the accident report with him?

A. Yes.

Q. How did he make that out?

A. In long hand.

Q. Did you have to sign it?

A. Yes, I signed it.

Q. Have you ever seen that accident report since?

A. No.

Q. Then did there come a time that Mr. Reich left the office?

A. Yes.

Q. Did he take the accident report with him?

A. Yes.

Q. Was that the only report that you made?

A. That is the only report I made, yes.

Q. Then after Mr. Reich left did you continue to stay in for lunch?

A. Yes.

Q. Did there come a time that you came out after lunch?

A. Yes.

Q. What time was that?

A. I don't know exactly, I would say probably a half or three quarters of an hour after that.

Q. This brought it somewhere around four o'clock?

A. Four, four thirty.

Q. Did you have to work until six thirty?

A. Thereabouts.

Q. So then that evening -- that morning did you then leave the railroad property?

A. Yes, I did.

Q. Did you make a report of any defect to that engine at the time?

A. No, I didn't.

Q. Why was that?

A. There was no reports available, no forms available.

Q. Where would the forms ordinarily be located?

A. At Halstead Avenue.

Q. Did you look for them?

A. Yes, I did.

Q. On the day shift, do they have any clerks around Halstead Avenue that have desks?

A. I'm sorry.

Q. On the day shift, do they have clerks around that would have forms?

A. The forms are in what we call the register room, the room that we have to attend before we go to work, and they are supplied by whoever is supposed to put them in there, clerks or whoever is responsible to renew forms.

Q. These forms, do some engineers carry their own?

A. Some do.

Q. Did you have any that evening?

A. No.

Q. After you left the railroad in the early morning of the 22nd, where did you go from there?

A. I went home.

Q. Where were you living at that time?

A. 25-A Garden Village Drive.

Q. How did you get home?

A. By automobile.

Q. Did you drive yourself?

A. Yes.

Q. What type of shift did you have on your car?

A. Automatic.

Q. And did you have to use the left leg?

A. No, I don't believe I did use the left leg. I usually brake with the right.

Q. When you went home that morning how did your leg feel?

A. Very painful.

Q. Anything else bother other than the left leg?

A. No.

Q. Whereabouts did it pain?

A. Right in the kneecap area.

Q. What type of pain was it, would you describe that?

A. It was an excruciating pain, like somebody stuck a --

MR. GRIFFIN: I object, if the Court please. This is an

analogy that somebody makes for argumentative and illustrative purposes.

THE COURT: I know the reference. I assume you never had that done to you, Mr. Eggert?

THE WITNESS: That injury --

THE COURT: You are about to say something, don't say it. You never had that particular thing done to you?

THE WITNESS: No, I haven't.

THE COURT: I will sustain the objection.

BY MR. COLLINS, SR.:

Q. Then when you got home what did you do?

A. I went to bed.

Q. Do you remember how long you stayed in bed?

A. I would say six to eight hours.

Q. Then what did you do after getting up?

A. I went to the company doctor.

Q. Was the knee still bothering you?

A. Yes.

Q. The company doctor, do you remember what doctor that was?

A. Dr. Militello.

Q. Dr. Samuel Militello?

A. Yes.

Q. Had he been the company doctor for years?

A. Yes.

Q. Had you been to him before for physicals on and off?

A. Yes.

Q. Where did you find Dr. Militello?

A. Clinton Street, 1221 Clinton Street?

Q. Was that at the Erie Lackawanna Yard Office or office at Clinton?

A. Yes.

Q. All right. And how did you get from your home to the Erie Lackawanna Office?

A. I drove there.

Q. Did the doctor have a clinic there or some type of dispensory?

A. Yes, a small dispensory.

Q. What did Dr. Militello do for you when you arrived there?

A. Nothing. He looked at me, examined me.

Q. Was this on the Tuesday?

A. Yes.

Q. He examined parts of your body?

A. He examined my left leg.

Q. Did he take a history of how the accident happened?

A. I believe he asked me something about what happened. I'm not certain, I was in an awful lot of pain, I don't recall. I believe he asked me something.

Q. Did you tell him you were hurt at work?

A. Yes.

Q. Then did he give you any medication or anything at that time?

A. I think he gave me a prescription for pain pills. He sent me to the Emergency Hospital.

Q. The Emergency Hospital on Pine Street in Buffalo?

A. Yes.

Q. For what purpose?

A. X-rays.

Q. When you got to the Emergency Hospital did you have x-rays taken?

A. Yes.

Q. What parts of your body?

A. Of the left leg, the knee.

Q. Were you able to drive from your Lackawanna Office at Clinton and Babcock to the Emergency Hospital?

A. Yes.

Q. And then after having the x-rays taken what did you do?

A. I went back home and went to bed, as I recall.

Q. Did you mark off work?

A. I believe I did.

Q. Did Dr. Militello okay your staying off work?

A. Not at that time.

Q. Did there come a time that you again saw Dr. Militello?

A. Yes.

Q. Do you remember when that was?

A. I believe it was the following day.

Q. Where did you see him at that time?

A. At Clinton Street.

Q. Did he say that he had reviewed your x-rays?

A. Yes.

Q. Did he prescribe anything for you at that time?

A. No.

Q. Did he -- what did he do for you, if anything?

A. He didn't do anything for me.

Q. Did he give you any instructions?

A. He said I was perfectly all right.

Q. He said you were perfectly all right?

A. Yes.

Q. And at that time were you able to walk on your left leg?

A. Not very well.

Q. How were you getting around?

A. At that time I was favoring the leg. Later I got on crutches.

Q. Do you remember when you got on the crutches?

A. A few days after that, I can't say for certain.

Q. Was there anything noticeable about your left knee at the time you went on the crutches?

A. It had a black and blue mark where it hit the valve.

Q. Where was that?

A. On the top of the kneecap.

Q. Then did you again see Dr. Militello?

A. Yes, I saw him again.

Q. And at that time what did he do for you?

A. Nothing. He told me that I may have a little water on my knee, that would clear up.

Q. When was that that you saw him the third time?

A. I'm not absolutely certain. He told me -- as I recall -- he told me to take a few days off and come and see him, it seems to me it was around a week.

THE COURT: A week later?

THE WITNESS: Yes, approximately a week later.

BY MR. COLLINS, SR.:

Q. Then did you see him again after that?

A. Yes.

Q. On how many occasions?

A. I'm not certain of the amount, of the amount of occasions that I saw Dr. Militello.

Q. What did he do for you on these visits?

A. Nothing.

Q. Did he examine the knee?

A. Yes.

Q. Did he move your leg?

A. Yes.

Q. All right. And you discussed the one set of x-rays?

A. Yes.

Q. Did he ever put any dye into the joint and x-ray it?

A. No, he didn't.

Q. Then from there did you go to any other doctor?

A. Yes, I did.

Q. Would you tell us when?

A. I'm not absolutely certain. I went to Dr. Godfrey on my own.

Q. Dr. Godfrey, where was he located?

A. Mercy Hospital.

Q. And did you see Dr. Godfrey himself?

A. No, not at that time.

Q. Does he have a clinic at Mercy Hospital in South Buffalo?

A. Yes, he does.

Q. Is Dr. Godfrey, to your knowledge, an orthopedic specialist?

A. Yes.

Q. Does he have a group of orthopedists that work for him?

A. Yes.

Q. Do you recall what doctor you first saw when you visited the Godfrey Clinic?

A. I believe it was Dr. Curtin.

Q. Do you remember what month that was?

A. That was in June, I believe.

Q. June of 1971?

A. Yes.

Q. When you saw Dr. Curtin what did he do for you?

A. He examined me.

THE COURT: This was still in June?

THE WITNESS: I believe it was, your Honor.

THE COURT: You had seen Dr. Militello the third time about the 29th, you said about a week after the accident?

THE WITNESS: Yes. I'm not certain of the amount of times that I saw him, Dr. Militello, in June.

THE COURT: How many times had you seen him before you went to Dr. Godfrey's Clinic?

THE WITNESS: I'm sure of twice. The third time, I'm not certain.

THE COURT: From what you told the jury it would appear that you had seen him three times, and then several other times when he was examining you and not treating you, then you went to Dr. Godfrey's Clinic. In fact, you went to Dr. Godfrey's Clinic earlier, after the second or third time you had seen Dr. Militello?

THE WITNESS: Yes.

BY MR. COLLINS, SR.:

Q. Did you inform Dr. Militello that you had gone to Dr. Godfrey's Clinic?

A. I told him that I was going to seek another examination.

Q. All right. Then Dr. Curtin, what did he do for you the

first time that you saw him?

A. He examined me and sent me for x-rays.

Q. Where were the x-rays taken?

A. At Mercy Hospital.

Q. On Abbott Road?

A. On Abbott Road.

Q. When you went to see Dr. Curtin were you able to walk on that knee?

A. I walked on it.

Q. You said that you had crutches, do you remember when you obtained the crutches?

A. Very shortly after that. I think I got them a day or two later.

Q. After seeing Dr. Curtin?

A. Yes.

Q. Where did you get the crutches?

A. I got the crutches from what they call a crutch closet or whatever, from Cooney's Drug Store in West Seneca.

Q. How long did you continue to use those crutches?

A. I used these crutches for three months or better.

Q. Did you continue to see Dr. Curtin at the Godfrey Clinic?

A. I went back to the Godfrey Clinic, and I can't recall who saw me again.

Q. Then did there come a time that you actually saw Dr. Godfrey, himself?

A. Yes.

Q. When was that?

A. Again, I can't recall the date. I'm sorry, I can't recall the date.

Q. I assume after June of 1971?

A. Yes.

Q. Sometime after?

A. Yes.

Q. Before 1972 though?

A. Yes.

Q. When you saw Dr. Godfrey what were your complaints?

A. I told him that I had a great deal of pain, excruciating pain, I couldn't put weight on the leg, I had this clicking within the knee.

Q. Did there come a time -- did you have any occurrence wherein the knee gave out on you during this period that you were seeing the doctors in the Godfrey Clinic?

A. Yes.

Q. Will you tell us when that happened?

A. The knee gave out on me in my apartment one day when I was standing at my kitchen sink or cupboard, and I went to turn to the right, and it went out on me.

Q. By going out, tell us exactly what happened?

A. It went just forward, I couldn't stop it, I couldn't control it, it just went.

Q. What happened to you?

A. I grabbed the cupboard and got myself up.

Q. Was it after this that you saw Dr. Godfrey?

A. Yes, I saw Dr. Godfrey after that.

Q. Did the doctor tell you -- what did Dr. Godfrey do for you when he first saw you?

A. He gave me a very thorough examination. He put his fingers around my knee joint and pressed with his thumb and he -- it really hurt, it was an excruciating pain. He said, "All right, I understand," or something to that effect.

Q. Then did he give you any medication to take?

A. I can't recall if he gave me a medication at that time or not.

Q. At any time did he give you medication?

A. Yes.

Q. In what form?

A. He gave me a -- I was having a problem sleeping -- he gave me a prescription for sleeping pills. He also gave me a prescription for pain pills.

Q. Now, how long did you remain away from work after June 21, 1971?

A. Until I believe January 4th of 1972.

Q. And at that time did Dr. Godfrey allow you to go back to work?

A. Yes, he did.

Q. What was the condition of your knee at that time?

A. It still bothered me a great deal, but I wasn't having the severe pain.

Q. What were you able to do in that period from June 21st to January 4th when you were undergoing treatment and seeing the doctors?

A. Not a great deal. I stayed off the leg most of the time. It aggravated it to be on it. If I went anyplace I used crutches more or less.

Q. Did you take any trips at that time?

A. Yes.

Q. Where did you go?

A. I went to the Pocono Mountains.

Q. How long did you stay there?

A. Three days.

Q. Were you driving at that time?

A. No.

Q. What did you do in the Pocono's?

A. Well, relaxed and took in a couple of shows.

Q. Did you do any dancing or anything of that nature?

A. No.

Q. Then after returning to work on January 4, 1972, did you continue to work as an engineer?

A. Yes, I did.

Q. And did you work off the list, continue to work off the list?

A. I believe I did. I'm not absolutely sure.

Q. That is where you were called on the phone and reported to whatever job they gave you?

A. Yes.

Q. Now, at that time when you went back to work were you able to walk on that knee?

A. Yes, I was able to walk on it.

Q. You were not using the crutches at that time?

A. No.

Q. Then did you continue to work following January 4, 1972?

A. Yes, I did.

Q. Did you lose any time because of the knee?

A. I lost some.

Q. We will get to that later. You have time books that show everyday that you worked and everyday you were off for the years 1971, '72, '73, '74, '75 and '76?

A. Yes.

Q. Then following that, did there come a time that you again took off work for a prolonged period?

A. Yes.

Q. When was that?

A. That was in June of 1972.

Q. Do you recall what date you discontinued working?

A. I believe it was the 13th or 14th.

Q. During the six months, that first six months of 1972, were

you still under Dr. Godfrey's care?

A. Yes.

Q. Did you see him often?

A. No, not too often. He gave me instructions to use the leg. His terminology was, "It will either be okay or it will blow up."

Q. Did he give you any type of therapy to exercise or do at that time?

A. Not at that time, no.

Q. He said use the leg?

A. Yes.

Q. And then did there come a time that you discontinued using it?

A. Yes.

Q. Tell us what happened then in June of 1972?

A. In June of 1972 he operated on me, Dr. Godfrey operated on me.

Q. What led up to the operation?

A. Well, I couldn't function any longer. I just -- the leg got progressively worse, I couldn't function any longer. I told him, "I can't take it."

Q. By "progressively," what do you mean, describe what happened?

A. Well, it become aggrivated all the time, and it was a constant pain. I was getting pain from the knee up to the

hip, just an excruciating pain, just gnawing pain in the whole joint.

Q. There came a time you said you went in for an operation?

A. Yes.

Q. Where did you go for the operation?

A. Mercy.

Q. Do you remember what that date was?

A. Either the 14th or 15th, I'm not quite certain, June 14th or 15th.

Q. Was that following Dr. Godfrey's orders?

A. Yes.

Q. Do you recall who operated on you at that time?

A. Yes.

Q. Who did?

A. Dr. Godfrey.

Q. Dr. Godfrey himself?

A. Yes.

Q. Do you have any scars or anything showing where the operation was performed?

A. Yes.

Q. What type of operation was it? I don't want you to describe the medical terminology. Did they have to cut through the skin?

A. Yes.

Q. We will have the doctor tell us about that. After the

operation did you observe your knee while you were in the hospital?

A. Yes, I observed it.

Q. What did you observe about it?

A. Well, it was all bandaged up, and it was very much swelled and very hot.

Q. How long did this hotness continue?

A. Well, it continued long after I got out of the hospital.

Q. How long did you continue in the hospital?

A. Pardon?

Q. How long were you in the hospital?

A. I believe twelve days.

Q. Did Dr. Godfrey continue to see you during this time?

A. Yes.

Q. Did there come a time that you were released from the hospital?

A. Yes.

Q. What was the condition of your leg at that time?

A. Well, I went out on crutches.

Q. Did the -- was it still bandaged?

A. Yes.

Q. Did you ever have a cast on it?

A. No.

Q. Just the bandages?

A. Yes.

Q. How long did they remain on the leg?

A. I can't really say, maybe a month.

Q. Then were you able to get around after that month?

A. Well, yes, on crutches.

Q. How long did you continue on the crutches?

A. Here again I would have to estimate. I would say four months.

Q. From June, July, August, September, October, you were still on crutches in October, to your knowledge?

A. Yes.

Q. Eventually did you get off of crutches?

A. Yes.

Q. Did you use any other assistance in walking after giving up the crutches?

A. Yes.

Q. What did you use?

A. A cane.

Q. How long did you use the cane?

A. I used that on and off for a couple of months.

Q. That would put you into December of 1972?

A. Yes.

Q. Did there come a time that you were allowed to go back to work?

A. Yes.

Q. Dr. Godfrey allowed you?

A. Yes.

Q. During this time that you were treating and you had the operation, did you again see Dr. Militello?

A. I'm sorry.

Q. Did you again see Dr. Militello while you were treating and during this time that you were in the hospital and had the operation?

A. No.

Q. Did you have to see him before you returned to work in -- when did you return, by the way?

A. The early part of January.

Q. Did you have to see Dr. Militello, the company doctor, before coming to work?

A. Yes.

Q. Where did you see him?

A. Clinton Street.

Q. What did he do at that time?

A. Examined me.

Q. And did he -- the examination consisted of what?

A. Looking at the leg and I think just an overall examination, too, as I recall.

Q. He allowed you to go back to work?

A. Yes, he did.

Q. Have you seen any other doctors, other than the ones that you have already mentioned, for this knee condition?

A. Yes.
Q. What doctor?
A. Dr. Lies.
Q. Dr. Lies, is he with the Godfrey Clinic?
A. Yes, he is.
Q. An orthopedist?
A. Yes. Also I'm quite certain Dr. Weiss examined me.
Q. Is Dr. Weiss with the Godfrey Clinic?
A. Yes, he is.
Q. Anyone else?
A. Not that I can recall.
Q. Then the operation was performed at Mercy Hospital on Abbott Road?
A. Yes.
Q. Now, after you returned to work then were you able to walk about on the knee?
A. Yes.
Q. Did it bother you?
A. Yes.
Q. How long did it continue to bother you?
A. Until this day.
Q. It still bothers you?
A. Yes.
Q. All right. So then you went back to work in January of 1973?

A. Yes.

Q. And you have continued to work up until the present?

A. Yes.

Q. During that time you have lost days because of the knee, have you?

A. Yes.

Q. Do you have that in your books that will show that?

A. Yes.

Q. Now, as far as this knee condition, have you had previous trouble with your knees, Mr. Eggert?

A. I had some trouble with my knees in 1966.

Q. All right. Would you tell me prior to 1966 had you ever had any trouble with your knees?

A. Yes, I had trouble with my right knee.

Q. Right knee?

A. Yes.

Q. What was that trouble?

A. It was banged or twisted, I can't recall what it was.

Q. Was that an accident?

A. Yes, it was.

Q. Where did that happen?

A. Ford Motor Company.

Q. As a result of that did you lose any time?

A. Yes, I did.

Q. Did you have any torn cartilage or fractures in that right

knee?

A. No.

Q. You said that was prior to 1966?

A. Yes.

Q. Do you remember when, approximately?

A. Approximately 1952.

Q. Who treated you on that occasion?

A. That was done at -- right at Ford Motor Company in a facility they had there.

Q. You were never hospitalized for it?

A. No.

Q. Then you say in 1966 you had trouble with your knees?

A. Yes.

Q. Would you tell me about that?

A. I had -- as I recall, I was painting my house and it was in the summertime, and I was getting some pain and stiffness in my knee joints going up and down the ladder, and whatever, and I become concerned about it, and so I was going to my doctor and have it looked at.

Q. What doctor did you go to?

A. I was going to my family doctor, which was Dr. Norton, but he was not in town, and Dr. Carfania was taking over his practice at that time, and I went to him.

Q. Where was Dr. Norton located?

A. Dr. Norton's office is on Grove Street, East Aurora, New York.

Q. Were x-rays taken of the knees at that time?

A. Yes.

Q. You did not see Dr. Norton?

A. No, I didn't.

Q. Dr. Carfania took over his practice in the same office?

A. No.

Q. Where was Dr. Carfania?

A. On the corner of Main and some street in East Aurora, I can't tell you the side street.

Q. You had x-rays taken?

A. Yes.

Q. Where were they taken?

A. Mercy Hospital.

Q. Were there any fractures or cartilage torn, to your knowledge?

MR. GRIFFIN: If the Court please, I object to this person testifying what x-rays showed. He wouldn't be competent to that.

THE COURT: Sustained.

MR. COLLINS, SR.: I didn't ask him what the x-rays showed, I said, "To your knowledge, did you have any fractures or cartilage torn?"

BY MR. COLLINS, SR.:

Q. So then after the x-rays, did you continue to have treatment with Dr. Carfania?

A. No. I believe I went back to see him, I don't believe there was any treatment, not that I recall.

Q. How often did you see him?

A. I think I saw him twice, possibly three times.

Q. Did he take any other type of tests?

A. I believe he did or had them taken, some lab work or something.

Q. He took some lab tests?

A. I believe so.

Q. At the time did he tell you to discontinue drinking beer and ale?

A. Yes, he did.

MR. GRIFFIN: I object to the hearsay.

THE COURT: What is hearsay about that?

MR. GRIFFIN: He is testifying as to what some other person told him to do.

MR. COLLINS, SR.: His treatment.

THE COURT: Advice, overruled.

MR. GRIFFIN: What he did, I have no objection to that.

BY MR. COLLINS, SR.:

Q. Had you been drinking a lot of beer and ale?

A. Yes, I had been drinking quite a bit.

Q. Did you ever have a drinking problem?

A. Yes.

Q. When was that?

A. That would be in 1966.

Q. Did you discontinue drinking after the advice of the doctor?

A. Yes, I did.

Q. All right. Did you drink after that at all?

A. Yes.

Q. Would you say excessively, moderately, how?

A. No, socially, moderately.

Q. All right. Now, in 1970, prior to your accident, did you have any problems with drinking?

A. No.

Q. And your work record for 1970, do you remember how much you earned in the year 1970?

A. Not offhand.

THE COURT: We will take a ten minute recess at this time.

(Thereupon the court was in recess at 10:25 A.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 10:35 A.M.

(Jury absent.)

THE COURT: I haven't cautioned you, Mr. Collins, there

hasn't been any objection, but you are doing an awful lot of leading of the witness. Minimize that so we can get the witness' testimony and not yours.

MR. COLLINS, SR.: Yes, your Honor.

(Thereupon the jury entered the courtroom at 10:40 A.M.)

T H O M A S W I L L I A M E G G E R T, called as a witness on his own behalf, and having been previously duly sworn, resumed and testified further as follows:

MR. COLLINS, SR.: Would you mark these?

THE COURT: Put the new markers on top of the old ones. 27 is the next number.

CLERK: Yes, your Honor.

THE COURT: These aren't already marked?

MR. COLLINS, SR.: I don't think I offered them.

THE COURT: You haven't offered anything. You are marking some exhibits, they have the appearance of --

MR. COLLINS, SR.: Oh, yes, I listed those.

THE COURT: Are these the same ones?

MR. COLLINS, SR.: Yes, I had better straighten that out.

(Thereupon documents referred to were marked Plaintiff's Exhibit 27 for identification.)

DIRECT EXAMINATION BY MR. COLLINS, SR. (Cont'd.):

Q. Mr. Eggert, I don't want you to testify as to the amounts or anything, I want to show you this exhibit for identification, and ask you if they are bills that you received, and as far as reasonableness, and so forth, I will let the doctor take care of that. Don't mention any amounts.

A. All right.

Q. Mr. Eggert, I show you Plaintiff's Exhibit 20 for identification, and ask you if that is a bill dated October 27, 1975, from the Emergency Hospital for services rendered that you received?

A. Yes, it is.

Q. I show you Plaintiff's Exhibit 21 for identification, and ask you if this is a bill that you received from Mercy Hospital for x-rays, dated October 27, 1975?

A. Yes, it is.

Q. I show you a bill, Plaintiff's Exhibit 22, it is a bill from the Godfrey Orthopedic Group, P.C., dated January 30, 1974, and ask you if that is a bill you received for services rendered by the Godfrey Group as a result of this accident of June 21, 1971?

A. Yes, it is.

Q. I show you a bill dated June 15, 1972, Plaintiff's Exhibit 23 for identification, and ask you if that is a bill you received from the Abbott Anestheseologist Associates, P.C., dated June 15, 1972?

A. Yes, it is.

Q. I show you Plaintiff's Exhibit 24 for identification, and ask you if that is a bill that you received from Mercy Hospital, dated October 27, 1975, for services rendered from June 14, 1972 to June 26, 1972?

A. Yes, it is.

MR. COLLINS, SR.: Your Honor, the income tax returns for the year 1970 through the year 1975, I was going to submit them as one package, would you rather have them marked individually?

THE COURT: I don't care. They have been marked, Number 18, aren't they?

MR. COLLINS, SR.: Yes.

THE COURT: Staple them together.

MR. COLLINS, SR.: Will you stipulate to the income tax returns?

MR. GRIFFIN: There's a lot of things in the tax returns I haven't had a chance to review. If they are offered at this time for the limited purpose of showing his earnings each year,

I have no objection. As to what extent they would be used beyond that --

THE COURT: Are those limited to his railroad earnings?

MR. COLLINS, SR.: Are they railroad earnings exclusively?

THE WITNESS: Yes.

THE COURT: The two of you pretty much know what he earned from the railroad.

MR. GRIFFIN: I think there is other income shown in the returns.

THE COURT: That is what I said, and he said no, he said railroad income.

THE WITNESS: I'm sorry, there might be something else in one of those.

THE COURT: Bank interest or something like that?

THE WITNESS: Yes.

THE COURT: What we are concerned with is the railroad income, are we not?

MR. COLLINS, SR.: Yes. I think I subpoenaed his work records, I can use those instead.

MR. GRIFFIN: I have no objection.

THE COURT: Can't you agree as to what they are?

MR. GRIFFIN: I have no objection to the tax returns going into evidence for that purpose.

THE COURT: We don't want the tax returns if they have a lot of extra material. All we need to

have is how much he earned from the railroad each year.

MR. GRIFFIN: We have the year by year earnings.

THE COURT: Do you agree to that, Mr. Collins, is it correct?

MR. COLLINS, SR.: I haven't seen them, your Honor.

THE COURT: All right, take a minute and look at them.

MR. GRIFFIN: There is some slight discrepancy in the figures, your Honor.

(Thereupon W-2 forms were marked Plaintiff's Exhibit 28 for identification.)

BY MR. COLLINS, SR.:

Q. I show you Plaintiff's Exhibit 28 for identification, and ask you if these are W-2 forms you received from your employer, the Erie Lackawanna Railroad, for the years 1970, '71, '72, '73, '74 and '75?

A. Yes, they are.

THE COURT: What is the first year?

MR. COLLINS, SR.: 1970 your Honor.

THE COURT: All right.

MR. COLLINS, SR.: I will offer them in evidence, your Honor.

MR. GRIFFIN: No objection.

THE COURT: All right, received, Plaintiff's Exhibit 28

is in evidence.

(Thereupon Plaintiff's Exhibit 28, previously marked for identification, was received and marked in evidence.)

MR. COLLINS, SR.: May I read the amounts?

THE COURT: No, they are in evidence.

MR. COLLINS, SR.: All right.

THE COURT: The jury will have them.

BY MR. COLLINS, SR.:

Q. Mr. Eggert, as a railroad employee working on the list, did you keep a record of all the times you worked through the years 1970 through 1976?

A. Yes.

Q. And how did you keep those records of the times that you worked?

A. By time book.

Q. Does that show the days off that you had or that you did not work?

A. Yes.

Q. Now, I show you Plaintiff's Exhibit 11 for identification, and ask you to take a look through it, and I ask you if you can recognize that book?

A. Yes.

Q. What is that, Mr. Eggert?

A. That is the 1970 record of my working time and time off.

Q. Is that the book that you kept in the regular course of your business as to your earnings with the Erie Lackawanna Railroad Company?

A. Yes.

Q. They only show the Erie Lackawanna earnings, they don't show anything else?

A. No.

Q. And this is accurate?

A. Yes.

Q. What is the purpose of keeping this book?

A. Well, so I know from week to week, if there is ever any question, I have a record.

Q. As to pay?

A. As to pay, yes, or if something comes up and I need a record, I have it.

Q. Does the accounting department have a record of the days that you worked, do you know?

A. I don't know. I don't know their system, really.

Q. Do you fill out a time slip and send it in?

A. Yes.

Q. They have records of your working, you keep that in the book?

A. Yes.

Q. And referring to Plaintiff's Exhibit 12 for identification, I ask you if that is the time book that you kept in the regular course of your business as an engineer for the year 1971?

A. Yes.

Q. And they are exclusively earnings of the Erie Lackawanna Company?

A. Yes.

Q. And I show you Plaintiff's Exhibit 13 for identification, and ask you if that is a true and accurate record of the days you worked and were off for the year 1972?

A. Yes.

Q. And referring to Plaintiff's Exhibit 14 for identification, I ask you if that is a true and accurate record that you kept of the days you worked with the Erie Lackawanna Railroad and the days you were unemployed in the year 1973?

A. Yes.

Q. I show you Plaintiff's Exhibit 15, and ask you if that is a true and accurate book of records for the year 1974?

A. Yes.

Q. And that is exclusively with the Erie Lackawanna Railroad?

A. Yes.

Q. And Plaintiff's Exhibit 16 for identification, is that a true and accurate record of the days that you worked and were off for the year 1975?

A. Yes.

Q. I show you Plaintiff's Exhibit 17, and ask you if this is a time record that you kept for the year 19 -- what year was that?

A. This is this year.

Q. 1976?

A. Yes.

Q. Up to date?

A. Up to date.

Q. It shows the days you worked and the days that you were off?

A. Yes.

Q. Referring to Plaintiff's Exhibit 12 for identification, Mr. Eggert, can you take me to the month of June 1971?

A. Yes. June 1971.

Q. And starting in June 1971, could you tell me what days you worked up until the 21st of the month?

A. Beginning from the first of June?

Q. Yes.

A. What days I worked?

Q. Yes.

A. I worked the 2nd twice, two shifts. I worked the 3rd, I worked the 4th, the 5th, 6th, 7th, the 7th, the 10th, 11th, 12th, 13th, 14th, 15th, 16th, 18th twice, 19th and the 21st.

Q. And the 21st. Did that come out to eighteen workdays out of those twenty one?

A. Yes.

Q. Those other three days, do you know what happened to those, the three days that you didn't work?

A. No, I don't know what I was off for.

MR. COLLINS, SR.: I will offer these in evidence, your Honor.

MR. GRIFFIN: I would have a couple of preliminary questions, if I may, your Honor?

THE COURT: Certainly. You are offering all the books, Mr. Collins?

MR. COLLINS, SR.: Yes, your Honor.

THE COURT: 11 through 17?

MR. COLLINS, SR.: Yes.

PRELIMINARY EXAMINATION BY MR. GRIFFIN:

Q. I have had a chance to read through some of these books, and each day that you worked you recorded information as to the locomotive numbers, maybe who your fireman or engineer is, and certain times, is that correct?

A. Yes.

Q. Now, do you have any statement in here as to why you would not have worked on any particular day?

A. No.

Q. So this is just a record of information as to the days that

you worked, is that correct?

A. Yes.

MR. GRIFFIN: I assume that is the sole purpose of the offer, to show the factual data as to dates worked, time worked, money earned, description of equipment worked with or anything of that nature. I have no objection on that basis.

THE COURT: Is that so?

MR. COLLINS, SR.: As well as days off, your Honor.

THE COURT: Yes.

MR. COLLINS, SR.: During the period.

THE COURT: Number of days in the year, days worked and days off. Without objection, I will receive Plaintiff's Exhibits 11 through 17.

(Thereupon Plaintiff's Exhibits 11 through 17, premarked for identification, were received and marked in evidence.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, do you know how much you earned in the year 1971 up until June 21st of that year?

A. Not the exact figure. I believe it was somewhere around $8,000.

Q. Referring to Plaintiff's Exhibit 28 in evidence, would $7,004.31 refresh your recollection?

A. Whatever the wage statement says. I'm not absolutely certain.

Q. Whatever is there in the W-2 is what you earned?

A. Yes.

Q. The W-2's are in evidence. Do you know the base rate of an engineer for the year 1970?

A. Not offhand.

MR. COLLINS, SR.: Will you mark this for identification?

(Thereupon document referred to was marked Plaintiff's Exhibit 29 for identification.)

BY MR. COLLINS, SR.:

Q. Before you come over did you compile a list, and I show you Plaintiff's Exhibit 29 marked for identification, and ask you if that is a compilation of the basic rate of pay for an engineer for the years 1970, '71, '72, '73, '74 and '75?

A. Yes, it is.

Q. Did you take that from some records, work records that you have?

A. Yes.

Q. What is --

THE COURT: Wait a minute, don't say what it is.

MR. GRIFFIN: May I see the exhibit? I haven't seen it. I take it the witness is going to use this to refresh his recollection?

MR. COLLINS, SR.: That is right.

MR. GRIFFIN: I have no objection.

THE COURT: All right, Plaintiff's Exhibit 29 is in evidence.

(Thereupon Plaintiff's Exhibit 29, previously marked for identification, was received and marked in evidence.)

BY MR. COLLINS, SR.:

Q. Using Plaintiff's Exhibit 29 to refresh your recollection, can you tell us what the basic rate for an engineer for a day was in 1970?

A. $34.

Q. Was that a seven hour day?

A. Yes.

Q. In the year 1971, the basic --

A. $34.

Q. It hadn't changed between '70 and '71?

A. No.

Q. Then the basic rate for the year 1972?

A. $42.

Q. And then the basic rate for the year 1973?

A. $47.75.

Q. The basic rate for the year 1974?

A. $50 to $51.

Q. Now, the basic rate for the year 1975 would be --

A. $58.32.

Q. And does that rate continue through this year?

A. No, there has been another raise.

Q. Do you know how much you get now per day?

A. $61.99.

Q. Do you want to write that underneath 1976?

A. (Witness marks exhibit.)

Q. That is $61.99 for the year 1976?

A. Yes.

MR. COLLINS, SR.: I will offer that in evidence, your Honor.

THE COURT: It is in evidence already. You already read it into the record.

MR. COLLINS, SR.: All right.

THE COURT: Do you want it in, Mr. Griffin?

MR. COLLINS, SR.: We did subpoena those. I think it is easier to do it this way. Excuse me a minute, your Honor?

THE COURT: Yes.

BY MR. COLLINS, SR.:

Q. Mr. Eggert, it is my understanding in the year 1971 following your accident you were off from January 21st until the end of the year?

A. Yes.

Q. You didn't work any days during that time?

MR. GRIFFIN: You said January.

BY MR. COLLINS, SR.:

Q. June 21st, 1971 until the end of December, you didn't work any days?

A. No.

Q. You were off until the 4th of January 1972, and went back to work?

A. Yes.

Q. And then from that time up until June of 1972, the 14th approximately, you have a record of the days that you lost?

A. Yes.

Q. Where is that record?

A. It would be in my time book.

Q. Would you take the book for the year 1972, and show me the days between January 4th and June 14th that you lost?

THE COURT: You are looking at what, Plaintiff's Exhibit 13?

THE WITNESS: Yes, your Honor. Do you want me to give the days I was off or day for day?

BY MR. COLLINS, SR.:

Q. Just go ahead and give me day for day. First of all, let me ask you this, can you tell us which days you were off as a result of this accident, because of the knee?

A. No, I can't.

Q. You can't do that accurately?

A. No, I can't. I would say ninety percent of the time that is in these books that I was off is because of the leg.

Q. Ninety percent?

A. Yes.

Q. Would you read then from January 4th on?

MR. GRIFFIN: January? If it please the Court, is this after January 4th and prior to surgery?

THE COURT: January 4, 1972. He went to surgery June 14th was the day of surgery he said. That is the period.

MR. GRIFFIN: But we have the records of when he worked and his days off. I object to going back now and saying, 'Well, I could have worked, I would have worked on this particular day,' and all that sort of thing. I think we are going to get into an awfully long situation here, and I object to that. The figures are in, and if it becomes pertinent, it is up to the tryer of the facts to figure out

when and where.

MR. COLLINS, SR.: I think he needs some assistance.

THE COURT: If he is unable to give that assistance, he is going to have to refer to Plaintiff's Exhibit 13 itself, which lets Mr. Eggert know the days he did not work, and he says he doesn't know and he can't say for a particular day that he was off that day because of the accident, but that in his opinion that ninety percent of the times he didn't work it was due to the knee.

THE WITNESS: Yes.

THE COURT: That is all we have, everything is in evidence.

BY MR. COLLINS, SR.:

Q. Now, getting into 1973, after your return to work, do you have a record of the days that you were off because of the knee?

A. Yes, I do.

Q. Could you read those days?

MR. GRIFFIN: Now --

MR. COLLINS, SR.: How are they marked?

THE COURT: Is this in Plaintiff's Exhibit 13?

MR. COLLINS, SR.: 14. He is going to read the days. I think that year he marked sick when he was off

with his knee.

THE COURT: Do you want to ask him some questions about that, Mr. Griffin? It is already in evidence, and it was the basis for Mr. Griffin not objecting to some of these if there was no indication in the book as to the reason that you were not working.

THE WITNESS: No, on some of the books I did mark at one time --

THE COURT: What books? Mr. Griffin was told that there wasn't any such annotation in Plaintiff's Exhibits 11 through 17. In what exhibit is that not true?

THE WITNESS: In Exhibit 14 there are some days marked.

THE COURT: That is the only one?

THE WITNESS: I'm not certain, your Honor.

THE COURT: You mean you are not certain whether in some of the other exhibits you also have marked it?

THE WITNESS: Yes.

THE COURT: Does that affect your position on the admissibility?

MR. GRIFFIN: Yes, your Honor. They were offered for the limited purpose of showing data without any conclusions or characterizations or

self-serving statements.

PRELIMINARY EXAMINATION BY MR. GRIFFIN:

Q. Mr. Eggert, referring to Exhibit 14, there is some red writing on certain days, the word "sick" is written in, did you write that in at some later date?

A. No, I didn't.

Q. Pardon?

A. No, I didn't.

Q. Did you write it in at the same time that you made the other entries?

A. Yes.

Q. Why is "sick" in red pen and the rest of the entries are in blue pen?

A. I put it in so it would stand out to me, so I could readily find it.

Q. You mean you had two pens, you chose a red pen to write "sick" and you chose a black or other pen to write the full entries?

A. Yes.

Q. You wrote it all at the same time?

A. Yes.

Q. Well, Mr. Eggert, in most instances where you had worked four, five, six or seven days in a row and you had a day or two off, you write in "sick," is that right?

A. Sick. There is sick there, what we are looking at, yes.

Q. The same thing in other parts, is that right, just about every day off after you worked three, four, five, six or seven days in a row, you write in "sick" in the early part of that exhibit, is that right?

A. At this time I believe I was working the extra list --

MR. COLLINS, SR.: Is this cross examination? I don't understand.

THE COURT: It concerns the admissibility of the exhibit.

MR. COLLINS, SR.: It is already admitted.

THE COURT: I know it was admitted on one ground, now we find that ground not true.

THE WITNESS: I said to show the days off, too, that was what you asked me.

THE COURT: You were asked expressly whether there was anything indicating why he was off on a particular day, and Mr. Griffin was told there was nothing in there, and now it appears that there is something in there.

MR. COLLINS, SR.: Would you have the reporter read that to me?

THE COURT: He don't have to, I recall it.

MR. COLLINS, SR.: I don't, your Honor.

THE COURT: I am concerned with the admissibility of Plaintiff's Exhibit 14, which he has in his hand. I will remove Plaintiff's Exhibit 14

from evidence and consider it as being reoffered, and I will ask you your position as to it?

MR. GRIFFIN: Your Honor, I, of course, have no objection to the basic data, the days when worked and the information recorded, nor do I have an objection to the blanks in the diary that he says were not worked. As to that portion where he chose to put in "sick," I object to that part of it. Frankly, I think the jury can probably figure it out.

MR. COLLINS, SR.: I object to it, your Honor.

THE COURT: That will be a matter of argument.

MR. GRIFFIN: I object to just the self-serving statements. If we can receive it without those self-serving statements and if there is an instruction that they are not in any way binding, then I have no objection.

MR. COLLINS, SR.: Your Honor, they are records kept in the regular course of his business.

THE COURT: No, they are not the regular course of business at all.

MR. COLLINS, SR.: They are as an engineer.

THE COURT: His personal records.

MR. COLLINS, SR.: It's keeping records of your time. If you

were a pipe fitter or plumber and you kept records --

THE COURT: If you are using those as a basis for sending out bills and that was your business to send out bills, I would agree. This isn't his business. I can't let that in under the shop records rule.

MR. COLLINS, SR.: I asked Mr. Griffin to produce the records. We will show through his own records every-day he was off. They are under subpoena, let's have those.

THE COURT: Certainly --

MR. COLLINS, SR.: Do you have those?

MR. GRIFFIN: We were subpoenaed for the earnings. I would be glad to check the subpoena. I produced the wage record. There was no day to day request for -- we have produced the gross wage and work record. I just frankly don't have on such short notice the day by day work records.

MR. COLLINS, SR.: Short notice? This accident happened in 1971.

MR. GRIFFIN: The subpoena was in my possession Monday morning. Let me explain this --

THE COURT: Would work records mean anything else to you,

other than the day by day records?

MR. GRIFFIN: I don't think so.

THE COURT: You inadvertently did not pay attention to that?

MR. GRIFFIN: No, your Honor. The records we had to get from Cleveland as to the wages, and we assumed that the principal thrust of that was the day by day, and requested it be sent special delivery from Cleveland. Monday is the first chance we had to check this. The subpeona was served last Friday relative to the work records. I don't want to be in a position of being a witness here, but my information is that when a man works there would be a record someplace in our accounting department that he worked on a given day and he got paid for it.

THE COURT: But it is that record that you are not able to get?

MR. GRIFFIN: I don't have a day by day --

THE COURT: Did you ask for it?

MR. GRIFFIN: I will check to see if we did. May I ask Mr. Burchard whether we asked for it?

THE COURT: Yes.

MR. GRIFFIN: Your Honor, we have not gotten the day by

day record or asked for it.

THE COURT: All right.

MR. GRIFFIN: May I ask a preliminary question of Mr. Eggert to see what type of record he would turn in?

THE COURT: Sure.

PRELIMINARY EXAMINATION BY MR. GRIFFIN:

Q. Mr. Eggert, when you would go to work on a given day would you turn a record into the company that you in fact worked that day?

A. In the form of a time ticket, yes.

Q. You turned in a time ticket?

A. Yes.

Q. Is the information that is contained in your books here, does that contain information that was on those time tickets?

A. Yes.

Q. Now, let's assume you did not work, assume that you did not go to work for any number of reasons, and you took a day off, you felt you were sick, you felt you were disabled, would you turn in a record to the company on the day that you did not show for work?

A. No.

Q. So all of the information as to the days you worked and what job you performed or the days that you did not work

would be in your books?

A. That is my record, yes.

MR. GRIFFIN: As I say, your Honor, the only concern I have is whether he has written in a conclusion which is a self-serving statement on his part. The rest of the information is already here. If the Court directs that I recheck to find those time tickets, I will instruct my people to try to locate the time tickets. I don't know whether they are in Buffalo or Cleveland.

THE COURT: No, we will allow Plaintiff's Exhibit 14 to stay in evidence and the others, and I will only instruct the jury, as the jury already knows from the testimony, that these are records kept by Mr. Eggert, himself, in his own hand, and have no official stamp, as far as the company is concerned, is not part of the regular records of the company, and anything in there then would be evaluated by you just as anything Mr. Eggert is saying orally from the stand. You will have to weigh what is in there and decide whether it is right or wrong, reliable or not reliable. Go ahead.

BY MR. COLLINS, SR.:

Q. Mr. Eggert, referring to Plaintiff's Exhibit 15 in evidence, what year is that?

A. 1974.

Q. 1974. Can you tell us how many days you were off in January of 1974?

A. Fourteen days.

Q. Fourteen days. How about February?

A. Fifteen days.

Q. March?

A. Twenty two.

Q. April?

A. Eleven.

Q. May?

A. Thirteen days.

Q. June?

A. Nine days.

Q. July?

A. Twelve.

Q. August?

A. Twenty -- I'm sorry, twenty one.

Q. September?

A. Eleven.

Q. October?

A. Eight.

Q. November?

A. Eight.

Q. All right. If my addition is right, it comes to one hundred fifty two days off in the year 1974.

A. I haven't given you December.

Q. Give me December.

A. Nine.

Q. You and I had gone over these before, that would be one hundred and fifty two days for the year 1974, if my addition is correct?

A. Yes.

Q. You could do the same with 1975?

A. Yes.

Q. And what percentage of that time in 1974 from causes you indicated caused you to take off any days of the one hundred and fifty two in 1974?

A. I would say ninety percent of the time is a fair figure because of the leg.

MR. GRIFFIN: I object to this. As I understand it, this includes all weekends, vacations, whether or not work was available.

THE COURT: It is a matter of argument. The jury heard the evidence, they will evaluate it, and they will listen to argument.

BY MR. COLLINS, SR.:

Q. Could you go through your book and give me the days off for 1973?

THE COURT: Let's not do that. The books show the days off, is that correct?

THE WITNESS: Yes, it does, your Honor.

THE COURT: All right. The book is in evidence.

BY MR. COLLINS, SR.:

Q. Just a couple more questions, Mr. Eggert. In addition to the trainmaster, Mr. Reich, that you gave the report to -- I think we subpoenaed that accident report, did you bring that, Mr. Griffin?

MR. GRIFFIN: Yes.

MR. COLLINS, SR.: Could I see it?

BY MR. COLLINS, SR.:

Q. You said Mr. Reich wrote it out in his own hand?

A. Yes, he did.

Q. The Erie Lackawanna Railway Company Telegraphic Report of Accident?

A. Yes.

MR. COLLINS, SR.: Do you want to mark this for identification?

(Thereupon document referred to was marked Plaintiff's Exhibit 30 for identification.)

BY MR. COLLINS, SR.:

Q. Do you remember whether Trainmaster Reich wrote that out in a pen or a ballpoint or what was it, do you recall?

A. I'm not certain.

Q. Did he show it to you after he had written it out?

A. He asked me to sign it, I believe.

Q. Did you sign it?

A. I believe I did.

Q. Showing you Plaintiff's Exhibit 30 for identification, I ask you if this is the report that was made out on the night of -- or the morning of June 22, 1971, if you know?

A. No, I don't know if this is the report.

Q. Is your signature on there?

A. No, it is not.

Q. It is signed by R.W. Reich, TTM, what is TTM?

A. Terminal Trainmaster.

Q. Your signature isn't on there?

A. No, it isn't.

Q. Now, then after your accident did you talk to anybody else, an official of the railroad, about the accident?

A. I talked with Mr. Reich, and I talked by phone to Road Foreman Edward Beyer.

Q. Do you recall when you talked to Mr. Beyer?

A. A couple of days after the accident, I believe.

Q. Did you talk to him in person?

A. No, a telephone conversation.

Q. Where were you when you had this conversation?

A. At home.

Q. You assumed he was at work?

A. I assume he was.

Q. What is the difference between a road foreman and a terminal trainmaster.

A. The road foreman is the -- locomotive power engineers and firemen, he is our direct supervisor. The terminal trainmasters more or less supervise the switching groups, this type of operation, although they have jurisdiction over the yard more so than the road foremen.

Q. And the road foreman has it over the engine crew?

A. That is true.

Q. So what was that conversation with Mr. Beyer?

THE COURT: Don't say what was said.

BY MR. COLLINS, SR.:

Q. You had a conversation with him?

A. Yes, I did.

Q. All right. And why did he call you?

MR. GRIFFIN: Well, I object to that.

THE COURT: No. He did call you?

THE WITNESS: Yes, he did.

THE COURT: All right.

MR. COLLINS, SR.: He is an official of the railroad, your Honor.

THE COURT: All right.

BY MR. COLLINS, SR.:

Q. He called you?

A. Yes, he did.

Q. And you had a conversation with him?

A. Yes.

Q. A few days after the accident?

A. Yes.

Q. Did you sign anything at that time, an accident report?

A. No.

Q. Did you have a conversation with any other official of the railroad? Was there an employee by the name of T.J. Wynn at that time?

A. Yes.

Q. What was Mr. Wynn's position?

A. He is the claim agent.

Q. I understand he is no longer employed by the Erie Lackawanna, he is retired?

A. I believe he is retired.

Q. And did you see Mr. Wynn after the accident?

A. Yes, I did.

Q. Do you remember when?

A. A few days afterward.

Q. Where was that?

A. In his office.

Q. Were you able to walk into his office?

A. Yes.

Q. And did you have a conversation with him concerning the accident?

A. Yes, I did. I was on crutches when I walked into his office.

Q. Then other than that, have you talked to anybody else or given any other report on this accident to officials of the railroad?

A. I'm not certain. Dr. Samuel Militello may have asked me about it. I'm not certain about that.

THE COURT: You said earlier that he had.

THE WITNESS: He may very well have, yes.

BY MR. COLLINS, SR.:

Q. Would you describe your knee to us today?

A. Well, it is constantly paining, sometimes more so than others. It's never less than a dull toothache, it gets very severe. If I'm walking on hard surfaces it swells, and when it swells I get shooting pains and heat, it gets hot, and the only way I can alleviate it is to stay off of it until the swelling goes down and the aggrevation goes away.

Q. Has this bothered you continuously since the operation?

A. Yes, it has.

Q. According to your exhibit you had days off. Could you give me an estimate of the number of days you have had off, the

percentage of the number of days you have had off because of the knee?

THE COURT: The same ninety percent?

THE WITNESS: Ninety percent, that is a fair figure.

BY MR. COLLINS, SR.:

Q. When was the last time you saw the doctor for your knee?

A. I'm sorry, I can't recall. It was some time ago, and I went to him and asked him, and he said --

Q. What doctor was it?

MR. GRIFFIN: I object to the conversation.

BY MR. COLLINS, SR.:

Q. What doctor?

A. Dr. Godfrey.

Q. You saw Dr. Godfrey?

A. Yes.

Q. Within the last year?

A. No.

Q. Did you see him in October of 1975?

A. I believe so.

MR. COLLINS, SR.: That is all, your Honor.

CROSS EXAMINATION BY MR. GRIFFIN:

Q. Well, Mr. Eggert, your knee pains you constantly, is that it?

A. Yes, it does.

Q. And yet you worked more hours and earned more money and worked more shifts in the first nine months of this year than you ever worked, is that right?

A. I don't know, I would have to check that.

Q. Don't you have all the records in the book?

A. Yes, I do.

Q. Haven't you made in the first nine months of this year close to $17,000 just for nine months?

A. I don't know what that figure is.

Q. I will correct that. Isn't it a fact through the month of September of this year you have made $14,608.67?

A. That sounds a little more like it.

Q. You made in 1975 well over $17,000, didn't you?

MR. COLLINS, SR.: I object to "well over," your Honor. He has the figures here.

BY MR. GRIFFIN:

Q. Where are the W-2 forms, let's see what you made in 1975. Did you make $17,667.95 in 1975?

A. $17,867.

Q. I think it is six hundred sixty seven, if you check.

A. Yes.

Q. That is in 1975. Now in 1974 did you make $14,331?

A. Yes.

Q. And in 1973 did you make $14,573 in 1973?

A. $14,500, yes.

Q. In the year 1970, which was the year before this accident, you had a lot of days off, didn't you?

A. Yes.

Q. Was ninety percent of the time that you took off in 1970 because you were sick?

A. I'm sorry. What was the question?

THE COURT: Read the question back, Mr. Noel.

(Thereupon the last question was read by reporter.)

THE WITNESS: I couldn't say that without checking the records.

BY MR. GRIFFIN:

Q. You only made some $9,000 in the year 1970, isn't that correct?

A. I couldn't tell you that without checking the record.

Q. Do you have the W-2 form for 1970 in front of you? Please check it.

A. Yes.

Q. What was the amount?

A. $9,300 -- I believe it is $9,336.12.

Q. Actually when you work, you schedule your work so that some months you work a lot, and then you are free and you can take off a week or two, isn't that true, that is the

advantage of working off the extra list, is that right, so that you are not confined to a particular job?

A. You are not confined to a particular job, no.

Q. There are certain personal advantages, so that you can schedule your work, your vacations or trips, whatever you want to do, consistent with the work program, sometimes you could work eighteen days out of twenty one, like you did in the month of June, right, of 1971?

A. This depends on what the extra list -- how it is going, how well it is going.

Q. Sometimes you have a number of days when there is no work for you, is that right?

A. Yes.

Q. Now, is it your claim in this case, Mr. Eggert, that you were sitting in the front seat on the fireman's side, and that you turned in that seat as you were sitting and somehow contacted your left knee on the emergency brake valve?

A. No.

Q. You don't make that claim, right?

A. I wasn't turning in the seat, no.

Q. All right. And is it your claim now that you were getting up from the seat to go around behind you to another seat, and then there was a movement of slack and you had an accident?

A. Yes.

Q. That is what you claim now?

A. Yes, it is.

Q. Now, is it true, Mr. Eggert, that the first time that you told anyone about that version, what your claim is today, was sometime in the year 1975 when you had new attorneys in the Ellicott Square Building, is that the first time since 1971, namely, about March of 1975, when you first made the claim and told anyone about the version of the accident that you are seeking to establish here in this case?

A. My attorneys always knew about this, I had told them. I had never told the railroad, they had not asked me.

Q. Didn't you testify in March of 1975 when I was questioning you that that day during the very questioning was the first time that you ever gave that version of the accident to anyone, didn't you testify to that?

A. Mr. Griffin, I thought you meant the railroad. I have always -- my attorneys have always known this, of course.

Q. Mr. Eggert, did you understand my question? My question was did you testify in March of 1975 that the first time that you gave that version of the accident that you now are claiming in this case was on that very date, did you testify to that?

A. I may have.

Q. Let me refresh your recollection. Incidentally, since you

have claimed today that you were not turning to the left and that -- as you were seated on the front seat, then you don't claim that as you turned your left knee came up against the brake valve, is that right, you don't claim that now?

A. I'm sorry, would you repeat that?

Q. You do not claim now in any respect that you were sitting and turning in your seat, turning to the left in your seat, and that your left knee in any way came in touch with the brake valve, you don't claim that at all?

A. The seat wouldn't turn.

Q. There was just -- I want to make it very clear -- you do not contend that the contact between your left knee and the brake valve was as you were seated and turning, is that right?

A. No, it wasn't.

Q. All right. And your present claim is that you were turning to the right to get up and get out of the seat, is that your claim?

A. I couldn't turn, the seat wouldn't turn.

Q. Did you -- to get up out of the seat to go around to the back, as you contend today, did you from a seated position attempt to move out of the seat to the right?

A. I attempted to move out of the seat to the right.

Q. That is all I want to know. As a matter of fact, Mr. Eggert,

did you ever make contact with your left knee as you were seated in the front seat, you claim you were seated in the front seat, at any time prior to the time you had your accident that you claim here, did any part of your left leg make any contact with any part of the brake valve or the pipes that go up to it or anything like that?

A. No, it didn't.

Q. As a matter of fact, didn't you testify that --

MR. COLLINS, SR.: I object to that line of questioning. He is laughing, and insinuating, I think this is a serious matter.

MR. GRIFFIN: I regard the charges against us very seriously, I agree.

THE COURT: Go ahead.

BY MR. GRIFFIN:

Q. Isn't it true that you testified that at all times when you were seated in the front seat on that particular morning, night or morning, that your left knee was five inches away from that brake valve?

A. No, the side of the seat is approximately five inches from the side of the bulkhead. My knee -- I can't tell you how close it was to that.

Q. Yet your contention is -- I will get back to this previous version -- your contention is that the back of the seat was cocked instead of being straight, and your contention is

as you sat in the front seat the back of the seat was cocked over into the center of the locomotive, is that your claim?

A. Yes.

Q. And you were sitting, you claim, all during these movements back and forth in that front seat, is that right?

A. Yes.

Q. And were you sitting with your back up to the back of the seat?

A. Yes, undoubtedly I was sitting with my back to the back of the seat?

Q. All right. I direct your attention to your sworn testimony of March 11, 1975, when you were in the company of your attorney, Mr. Gerard Lankes, in the Ellicott Square Building, you recall that? That is the first time that you testified under oath in this case, is that correct?

A. Yes.

Q. Now, your accident happened, you claim, on June 22, 1971, right?

A. Yes.

Q. And you then at some later date retained the firm of Weber & Weston, is that correct?

A. Yes.

Q. And sometime in the year 1973 the suit papers were filed in this court by Weber & Weston, is that correct?

A. Yes.

Q. And thereafter you filed -- thereafter certain answers to interrogatories, certain answers to questions that our office asked were filed in this court, do you remember that?

A. Yes.

Q. Then you decided to change lawyers, is that correct?

A. Yes.

Q. And you first consulted with an attorney who handles railroad cases in Albany by the name of Mr. Homer Peters?

A. Yes.

Q. Did you tell him -- did you tell Mr. Peters your version of what happened on June 22, 1971?

A. No.

Q. You consulted with him and you didn't tell him your version?

A. That is right.

Q. Did you tell the first lawyers that you retained, who filed this suit, did you tell them your version of what happened on the night-morning of the accident?

A. Yes, I did.

Q. You then sometime before March 11, 1975 changed attorneys and hire Mr. Gerard Lankes?

A. Yes.

Q. And when you hired Mr. Lankes did you tell him your version of what happened on June 22, 1971?

A. Yes.

Q. Now, going to March 11, 1975, and the transcript of that proceedings, I direct your attention to Page 103, Line 23, and before you testified on March 11, 1975, were you sworn to tell the truth?

A. Yes.

Q. Did you tell the truth that day?

A. Yes.

Q. You were represented at this questioning by Mr. Lankes, your lawyer, is that right?

A. Yes.

Q. And before you were questioned, and earlier in that day, had you met with Mr. Lankes and gone over the areas that you might be questioned on?

A. We discussed it, yes.

Q. All right. And now, were you asked this question and did you give this answer on March 11, 1975 under oath:

"Q. Have you ever told anyone up to today this version of what happened that night or morning?

A. No."

Were you asked that question and did you use that answer under oath on March 11th?

A. I thought you were referring to the railroad.

Q. I didn't ask you what you thought, I asked was that your sworn testimony?

A. Yes.

THE COURT: We will break at this point for the noon recess, ladies and gentlemen, and come back at one o'clock.

(Thereupon the court was in recess at 12:02 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:20 P.M.

(Jury present.)

(Thereupon x-rays were marked Plaintiff's Exhibits 31 and 32 for identification.)

THOMAS WILLIAM EGGERT, called as a witness in his own behalf, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: All right, Mr. Griffin.

MR. GRIFFIN: May I continue, your Honor?

THE COURT: Yes.

CROSS EXAMINATION BY MR. GRIFFIN (Cont'd.):

Q. Mr. Eggert, before the noon recess my last question was whether in fact you testified in March, March 11, 1975, that the first time -- strike that -- that you didn't give the version of the accident where you claimed you were getting out of your seat and the slack tossed you, that you testified then that you did not give that version to anyone prior to that date, do you remember that, that was your testimony back in March 1975, correct?

A. I thought you were referring to the railroad.

Q. No, no, Mr. Eggert. You testified, plain and simple, in March 1975 that you had not given the version of the accident that you are not contending happened, you hadn't given that version of the accident or told anybody about it prior to March of 1975, wasn't that your testimony then?

A. I had given it to my attorneys.

Q. I am not asking you for an explanation, I am asking whether that was your testimony?

A. I believe I said no to that.

Q. I don't want to belabor it, but let's go to one question before that, Page 103, Line 17:

"Q. Did you do anything to brace yourself for the slack?

A. I grabbed the seat and the slack came in, it threw me back and I grabbed the seat, but then I went over against the bulkhead and went down, it threw me down into the valve."

Was that your testimony then?

A. Yes.

Q. That is in March with your new lawyers. Then you were asked the next question and you gave the following answer:

"Q. Have you ever told anyone up to today this version of what happened that night or morning?

A. No."

Do I correctly read your testimony that you gave at this pretrial hearing in March of 1975 in your attorney's office?

A. I misunderstood what you meant.

MR. GRIFFIN: Your Honor, I move to strik the witness' answer.

THE COURT: The only question before you -- of course, you will have an opportunity to explain when your lawyer asks you further questions -- the only question is whether at the time of the examination you did say what is there in the transcript. If you say you didn't say that, then that is one thing. If you say you did say that, so state. You will have an opportunity to explain it later.

THE WITNESS: I did say no.

BY MR. GRIFFIN:

Q. Now, Mr. Eggert, I direct your attention to answers to interrogatories that you gave in this case, sworn to January 30, 1974, and I will ask you whether you were not asked Question 2. "State specifically how the accident occurred?" You have an answer sworn to January 30, 1974, before F. Lambert Haley, Notary Public, is that correct?

A. Yes. It is not my signature.

Q. Well, if we could have the original? Perhaps your lawyer would agree that your signature is on the original as filed with the court. If we could have the original, your Honor?

THE COURT: This is answers to interrogatories?

MR. GRIFFIN: Yes, your Honor.

THE COURT: Which one? Is this the one answering the Norfolk & Western?

MR. GRIFFIN: No, this would be answering the Erie Lackawanna, your Honor.

THE COURT: All right.

BY MR. GRIFFIN:

Q. Do you recognize your signature on the original of this sworn answer to interrogatories?

A. Yes, I do.

Q. And that was sworn to January 30, 1974, before F. Lambert Haley?

A. Yes.

Q. He was a lawyer with the firm of Weber & Weston, right?

A. Associated with them, yes.

Q. And did you read these over before you signed them?

A. Not really.

Q. You mean you signed these answers without having read them at all?

A. Yes, more or less.

Q. Is there anything in these answers, Mr. Eggert, that refers to slack action and your being thrown back into a seat or anything like that? Is there anything in these answers, and I will ask you to read Number 2 to yourself, which is your response to "State specifically how the accident

occurred?" Tell me if there is anything in that sworn answer of January 1974 which makes reference to slack in any respect?

A. No, there isn't.

Q. Mr. Haley or your attorneys were not present when the accident occurred?

A. No, they were not.

Q. The source of any information had to come from you, did it not?

A. Yes.

Q. All right. Now, were you also asked the following question, Number 4, with respect -- strike that -- Number 3, were you asked the names and addresses and job classifications of your fellow crew members who were working with you at the time of the accident, and did you provide that there was a fireman, conductor and two switchmen? Did you describe there was a fireman, a conductor --

THE COURT: One question at a time.

BY MR. GRIFFIN:

Q. All right. Is that question answered, Number 3?

A. I will read it.

Q. Read it to yourself.

A. Mr. Kendall's name and address are here, he was working with me, yes.

Q. Does it also state, "Job classifications of the plaintiff's

fellow crew members who were working with him at the time of the accident were a fireman, conductor and two switchmen. The fireman was named William Kendall, but the names and addresses of the other crew members are not presently available to plaintiff." Was that your answer?

A. That is what is down there. At the time I didn't recall all of the crew.

Q. Sure. You didn't recall all of the names of all of the crew at the time you signed this for your lawyer, is that right?

A. No, I didn't.

Q. You worked with different crews, sometimes you forget the particular names, right?

A. Yes.

Q. But generally you worked with a fireman and then a ground crew of three persons, a conductor and two brakemen or switchmen?

A. Yes.

Q. Were you asked the next question and did you swear to this answer also? The next question was "With respect to each of the persons names in your answer to the preceding interrogatory, what was his exact location and in what activity was he engaged at the time of the alleged accident?" Would you please read your answer, your sworn answer to Number 4?

A. (Witness examines document.)

Q. You may read it out loud, please.

A. "The fireman, William Kendall, was on the right side of the locomotive at the controls. One of the switchmen was in the locomotive cab, and the conductor and another switchman were on the ground along the right side of the train."

Q. Now, did you swear to the fact that at the time of the accident there was a third person in the cab, is that what it says in your answer?

A. The third person was in the cab before the accident. That was my mistake.

Q. Mr. Eggert, didn't the question that was asked say "What was his exact location and in what activity was he engaged at the time of the alleged accident?" That is the question you were responding to?

A. Yes. I said that was my mistake. He wasn't in the cab, I was wrong.

Q. Your sworn testimony today is there was no one else in the cab, is that right?

A. That is right.

Q. You swore on January 30, 1974 that there was a third person in the cab, is that right?

A. The man was in the cab before the accident happened.

Q. Didn't you swear to the fact that he was in the cab at the time of the accident?

A. Yes, I did.

Q. Now, you also swore, as of January 30, 1974, that you had lost $39,000 worth of wages from the time of the accident up to January of 1974, didn't you swear to that?

A. These were the figures I was given. I have no way of knowing what the men earned outside of what they gave me.

Q. Wasn't that an untruthful answer that you gave, $39,000?

A. Yes, it was.

Q. You admitted last October in the first trial of this case that that was an untruthful answer?

A. Yes, I did.

Q. Mr. Eggert, you have had a number of experiences where you made a claim for money arising out of a personal injury over the past twenty years, isn't that right?

MR. COLLINS, SR.: Your Honor, I object. That has nothing to do with this lawsuit.

THE COURT: Overruled.

BY MR. GRIFFIN:

Q. You are not inexperienced in filling out claim forms or making claims for damages arising out of personal injuries, are you?

A. I was thrown through a window on a locomotive on the railroad and I made -- they paid me my --

MR. COLLINS, SR.: This is over my objection.

THE COURT: I understand it is over your objection.

MR. COLLINS, SR.: Nothing to do with the injury involved.

THE COURT: I overruled your objection.

MR. COLLINS, SR.: Exception.

BY MR. GRIFFIN:

Q. Weren't you represented sometime in the 50's, didn't you make a claim and fill out papers in connection with an injury on the Crystal Beach Boat when you were represented by Attorneys Desmond & Drury?

A. Yes, I did.

Q. Didn't you on two occasions in the early 50's in connection with automobile accidents make out claim forms to insurance companies where you had various injuries to certain parts of your body?

MR. COLLINS, SR.: Your Honor, I object to this and move for a mistrial. Mr. Griffin's highly prejudicial line of questioning has nothing to do with the accident in this case.

MR. GRIFFIN: I think it has.

THE COURT: Overruled, motion denied.

THE WITNESS: I don't know what you are referring to. I had an automobile accident in 1956.

BY MR. GRIFFIN:

Q. Then you had one in 1951, too?

A. Yes.

Q. Then you told us you had a compensation claim at the Ford

Motor Company, right?

A. I was a passenger in the 1951 accident, and I was paid for, you know, compensation.

Q. I'm not concerned with whether you were paid. You have had considerable experience in reporting accidents, have you not, over the years?

A. I don't know what you would call considerable.

Q. Haven't you had occasion to report -- before 1971 -- haven't you had occasion to respond to inquiries as to how an accident happened, where you were making a claim on at least five or six occasions?

A. No, I didn't explain a lot of these accidents at all.

Q. Didn't you have to fill out forms as to how they occurred?

A. I may have, I don't recall.

Q. Now, when you -- the first person that you reported this accident to on the Erie Lackawanna was a terminal trainmaster, Mr. Robert W. Reich, is that correct?

A. Yes.

Q. That was within a few hours after you claimed it occurred, is that correct?

A. Yes, a very short time after.

Q. Now, didn't you report to Mr. Reich in these words, "Turning around on seat of Engine 2500 struck left knee on emergency valve lever."

MR. COLLINS, SR.: I object to the use of this statement. There

is no proof as to its authenticity.

THE COURT: The only question is whether or not he said that. If he didn't say it --

MR. COLLINS, SR.: Your Honor --

THE COURT: Please, Mr. Collins, let's not lead the witness, let him answer the question.

BY MR. GRIFFIN:

Q. Did you report to Mr. Reich within a few hours after the accident that you claimed occurred the following, "Turning around on seat of Engine 2500 struck left knee on emergency brake valve lever."?

A. I doubt if I said that because that isn't the say it happened.

Q. Didn't you testify last October that is what you did report?

A. I didn't report that I turned on the seat, the seat wouldn't turn. It was -- there was no way I could turn on the seat.

Q. I know that that is your claim today, Mr. Eggert, but my question is when you reported it to Mr. Reich isn't that what you said, you were turning on the seat and you struck the emergency brake valve?

A. I doubt that very much.

Q. Let's see if I can refresh your recollection. Directing your attention --

MR. COLLINS, SR.: Why don't you mark that?

MR. GRIFFIN: Does the Court feel that it is necessary to

mark the record of the testimony last October?

THE COURT: Well, why don't we mark this? Hand this over to him, Mr. Eggert.

MR. GRIFFIN: Would the Court like a copy?

THE COURT: No. Mark that Defendant's Exhibit 1.

MR. GRIFFIN: I think Defendant's Exhibit 1 is a photograph.

THE COURT: That is correct, mark it Defendant's Exhibit 2.

(Thereupon transcript referred to was marked Defendant's Exhibit 2 for identification.)

BY MR. GRIFFIN:

Q. Incidentally, Mr. Eggert, just to go off on another subject for a moment, and I will return to that, in 1966 when you had problems with your left knee, you experienced a grating sensation in it, did you not?

A. I had trouble with both knees at that time.

Q. I will repeat the question. When you had trouble with your left knee in 1966, Mr. Eggert, did you experience a grating sensation in your left knee?

A. Yes.

Q. Mr. Eggert, directing your attention to your sworn testimony of October 28, 1975 in Exhibit 2, this testimony was

given in the first trial of this case a year ago, is that correct?

A. Yes.

Q. And the following questions that I asked you at that time were asked of you right in this courtroom, you were seated right here, is that correct?

A. Yes.

Q. And you had been sworn by the Clerk of this court, as you were yesterday, to tell the truth, isn't that true?

A. Yes.

Q. All right. Now, were you not asked this question and did you not give this answer --

MR. COLLINS, SR. The page?

BY MR. GRIFFIN:

Q. Page 133, Line 10:

"Q. Now, did you report to Mr. R. W. Reich, the terminal trainmaster, and I quote, 'Turning around on seat of Engine 2500 struck left knee on emergency valve lever,' is that what you reported?

A. Undoubtedly, yes."

A. If it is there, yes.

Q. That was your answer, "Undoubtedly, yes," when you were asked that question a year ago, isn't that true?

A. The seat would not turn.

Q. Mr. Eggert, I am asking you whether you responded, "Undoubtedly

yes" on October 29 of 1975, right from this seat, when you were asked whether you told Mr. Reich that you were turning around on the seat of Engine 2500 struck left knee on emergency brake valve lever?

A. I see it says, "Undoubtedly, yes."

Q. The next question and answer:

"Q. You reported to the first person that you explained this alleged accident to that you were turning around on the seat of Engine 2500, correct?

A. Trying to turn around, I was turning around."

A. That is right.

Q. That was your testimony, wasn't it?

A. I was trying to turn around, that is right.

Q. "Q. You further reported that in the process of so turning you struck your left knee on the emergency valve lever, correct?

A. Correct."

A. That is right.

Q. That was your testimony?

A. Yes.

Q. All right. Now, do you recall that within that first time that you saw Dr. Militello that he asked you what happened in connection with your accident, do you recall that?

A. I don't recall his -- no, I don't recall it.

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Q. Didn't you say to Dr. Militello in describing how your accident happened, and I quote, "I turned around to watch signals, and I struck my left knee on emergency brake valve." Did you tell that to Dr. Militello?

A. I can't say, I don't know.

Q. Were you asked this question on Page 180 of Exhibit 2, again from this chair did you give this answer last year, the question on Line 4:

"Q. Did you tell Dr. Militello as to how the alleged accident occurred, and I quote, 'I turned around to watch signals and I struck my left knee on emergency brake valve,' did you tell him that?

A. I may have."

That was your testimony, wasn't it?

A. I may have.

Q. Now, Mr. Eggert, was the locomotive always headed in the same westerly direction with the short end or the front of the engine in a westerly direction all that night that you were working on it?

A. Yes, it was.

Q. And from the time that you started to work in the vicinity of ten thirty up to the time that you claimed you had an accident about two thirty in the morning, during that approximately four hour period you went back and forth, east and west, across Halstead a number of times, did you not?

A. Undoubtedly, yes.

Q. And at all times that you went back and forth, east and west, with the locomotive, the locomotive always heading in the same direction, did you sit in the same seat?

A. Yes, I did.

Q. And all during the movements did you face in the direction that you were moving?

A. I couldn't fact, I looked around, but I couldn't face that way, my body --

Q. Did you at all times that you were moving to the west look to the west?

A. Yes, when I was moving to the west I looked to the west.

Q. When you were moving to the east did you look to the east?

A. Yes, I did.

Q. And is the way that you looked to the east when you were moving back east by turning your head around?

A. Yes.

Q. And you say at no time did any part -- up to the time you claim you were out of your seat or getting out and some slack hit you -- any time up to the time of the accident did your left knee brush up against the emergency brake valve or any part of the emergency brake valve, such as the pipe that leads up to it?

A. No.

Q. So as the engine would move to the east, you would look

back to the east and observe what was ahead of you in an easterly movement, is that right?

A. As best I could, yes.

Q. That was your job, right?

A. Yes. On the left side, yes.

Q. And did you have your left arm on the arm rest that was on the window of the locomotive?

A. No.

Q. Did you have your arm outside of the window?

A. The window was closed.

Q. You say the window was closed?

A. Yes, it was.

Q. And this was on the 21st and 22nd of June?

A. Yes.

Q. And isn't it customary, at least in the spring and summer months, when you were in the cab of a locomotive that you open the window and put your arm out, and when you are looking forward or back for signals that you look out the window?

A. No, we keep the window closed a lot at night, it gets very damp.

Q. Doesn't the inside of that cab, by reason of the motors, and so forth, doesn't it generate heat?

A. No, there's grids outside to take the heat away, big fans to take all the heat.

Q. You don't get any heat in the cab of a locomotive?

A. Not unless you have the heater on.

Q. It is your contention that the window was closed at all times?

A. On my side.

Q. How about the engineer's side?

A. No, they would be open.

Q. The engineer's would be open?

A. Yes.

Q. Why were they open?

A. He was working, he has to -- you know -- he is looking out, talking to the conductor from the window, you know, that type of thing.

Q. Weren't you also working on the fireman's side?

A. No, I'm a lookout on the left side, I'm a lookout. He's got to communicate with the ground man, that is why he has to have the window open.

Q. Isn't it your testimony here that you seeking to observe whether a ground person was on your side, is that right?

A. Yes.

Q. You didn't seek to turn and look out the side window, turn your head?

A. Rear window, looked out the rear window. The side window would show me nothing.

Q. You didn't extend your body outside of the window alongside

the cab?

A. I don't extend my body out of those cabs at all, I want to stay alive.

Q. When you were operating the engine, don't you lean out the side window to look?

A. No.

Q. You say Kendall wasn't doing that at all? I thought you told us the engineer when communicating with the ground people looks out the side window?

A. When he is communicating, talking to them. If we are going to make this move, the conductor might be down here briefing him on what is going to be done, and he is leaning out. In operation he wouldn't be leaning out.

Q. Isn't one of the purposes that there is an arm — there are pads on the sill of the window for your comfort when you are looking out the window either way you are facing?

A. More for protection.

Q. Directing your attention to Exhibit 25, which is in evidence, and had been identified as the N&W 2500, I will ask you whether there aren't arm rests located on the sill of the window, two arm rests on the sill of the window?

A. These are on the sill of the window because the window was open. If it was closed, they flip down.

Q. Didn't you testify that that picture fairly represented the conditions of the locomotive as it was on the night of

the accident, except that the front seat had been removed for purposes of the picture?

A. I believe I said something about the windows were closed, too. I'm not absolutely certain.

Q. You did say something about the windows had been closed, I agree, that was your sworn testimony earlier, and I am probing that. Now, aren't the purposes of those arm rests, aren't those pads that are on the window sill, aren't they arm rests?

A. No, not necessarily. When the window would be closed -- they would be like this if the window was open, on top of the ledge. If it was closed, you would tilt them down, they become cushions.

Q. If the window is open and they were in the position they were in as shown in the photograph, they serve as arm rests for a person who is resting his arm on it, isn't that true?

A. I don't know why anyone would be resting their arm out of a locomotive unless they want to lose it.

Q. Is it your testimony, Mr. Eggert, that it is not customary that when a person is sitting in a seat and looking out of the fireman's side in either direction, and the window is open, and the arm rests are in the position shown in Exhibit 25, that one's left or right arm is resting on them for purposes of aiding in making observations, is that your

testimony?

A. Mr. Griffin, I can speak for myself. I don't use it as such. What other employees do, that is entirely up to them.

Q. Are there similar arm rests on the engineer's side?

A. Yes.

Q. And when you operate the engine on the engineer's side do you place your right arm at all on those arm rests?

A. Again, no I don't.

Q. You never used them?

A. Yes, I use them as a cushion, not as an arm rest.

MR. GRIFFIN: May this exhibit be shown to the jury at this time so they will follow the line of questioning?

THE COURT: They have seen it. Hold it up in front of them. I think you can point to the particular thing you want them to pay attention to later.

MR. GRIFFIN: The arm rest on the window sill.

THE COURT: If you want to pass it, you may.

MR. GRIFFIN: I will continue questioning.

BY MR. GRIFFIN:

Q. So you on a number of occasions, with the window closed, as you claim, Mr. Eggert, had made observations going in an easterly direction, is that correct?

A. Yes, as best I could.

Q. And Mr. Kendall you say asked you to see whether you could see anyone on your side back to the east, is that correct?

A. Yes. He asked me if I could see the signal on my side, yes.

Q. Back to the east, right?

A. Yes.

Q. And you proceeded to look through the window to see that?

A. No, no, no, I didn't. When I am communicating with the man running an engine I face him. I have railroaded for twenty three years, I never had a collision and I lay this to some of my way of operating. I will not communicate back to back, there is no sense in it, there is no reasoning for it.

Q. Mr. Eggert, you were proceeding in a westerly direction at the time, right?

A. Yes.

Q. And you were looking in that particular direction right from the front seat, is that your claim?

A. Yes.

Q. Now, Mr. Eggert, Mr. Kendall asked you whether you could see something behind you to the east, isn't that correct?

A. Mr. Kendall asked me if I could see anyone on my side.

Q. Did you turn, as you had on other occasions when you were moving to the east, did you turn around and look to the east through the window?

A. No, because I couldn't communicate with him like that.

Q. I am asking you, Mr. Eggert, did you turn around in the fashion that you had previously turned around to look, to make observations to the east?

A. No, I didn't.

Q. Now, you had worked within a day or two before June 22nd on the very same engine, had you not?

A. Yes, I had.

Q. And you learned that for the first time when I questioned you last October, isn't that right?

A. No, my time book shows it.

Q. You didn't realize until you were questioned last October that in fact the shift before the claimed accident shift that you had worked the very same locomotive?

A. No, I hadn't worked on that locomotive the shift before that.

Q. What was the second shift before?

A. No, it was the day previous to that. It was the day -- I think it was -- I believe it was Saturday.

Q. It was the last shift that you had worked --

A. Yes.

Q. -- before you had the accident?

A. Yes.

Q. Within how many hours before you started work on the 22nd, how many hours prior to ten thirty on the 21st had you left

been aboard Engine 2500?

A. Forty hours, I guess.

Q. And as the engineer you were responsible for the entire locomotive, isn't that true?

A. No, that is not true.

Q. You are not responsible to make reports as to any problems with the locomotive after you go off your shift?

A. If they are brought to my attention, yes, or if I see them.

Q. If you have knowledge or experience from any source relative to any problem with the locomotive, you are required to make out a report at the close of your shift, isn't that true?

A. That is true.

Q. Now, did you report anything wrong or defective with Engine 2500 when you last used it approximately forth hours before the 21st of June?

A. No, I didn't.

Q. And there was nothing to report, was there?

A. I can't say that.

Q. Didn't you testify last October that there was nothing to report?

A. There was no work reports available.

Q. There was no work reports available?

A. There was no work reports available.

Q. You mean there was no papers or anything that you could

report, you had nothing to report, did you?

A. I would have reported, you know, the basic things that all locomotives should be checked for at the end of every shift.

Q. But at the close of the last shift on Engine 2500 was there anything that you wanted to report on the locomotive?

A. Yes.

Q. What?

A. I wanted to report sanders, adjust brakes, supply engine, clean cab.

Q. You didn't report it?

A. No, I didn't.

Q. Mr. Eggert, directing your attention to Page 141, Line 6, question --

THE COURT: This is Defendant's Exhibit 2?

MR. GRIFFIN: Yes, your Honor, thank you.

BY MR. GRIFFIN:

Q. This was your sworn testimony again last October, was it not? Were you asked this question and did you give this answer:

"Q. So you didn't turn in any report of any problems with Locomotive 2500 after your tour of duty on the 19th, is that right?

A. There was nothing wrong with it, as far as I know, but there was no reports either."

Was that your testimony?

A. Yes, that is true.

Q. Now, it is customary, is it not, that you divide the operation of the locomotive, if you have a man who at least has some experience on the railroad you switch off, you, holding the title of engineer, will operate part of the time, and permit the fireman to operate it another part of the time, isn't that true?

A. That is entirely up to the engineer.

Q. And that was your custom because it breaks up the night and adds a little variety to the work?

A. No, it is not my custom.

Q. You mean what you were doing with Kendall was unusual?

A. No, Kendall is a good man.

Q. And was Mr. Harlock a good man?

A. There is nothing wrong with Harlock.

Q. Didn't you work with any number of different firemen in the weeks and months before June 21, 1971?

A. Yes.

Q. And didn't you regularly permit an experienced fireman, who had experience in operating a locomotive, to switch off with you?

A. This all depends on the individual again.

Q. And you now remember, you swore yesterday, that you did not let Harlock operate the engine on that last tour of duty, do you remember your sworn testimony?

A. Yes.

Q. And you distinctly recall that today, some four or five years later?

A. I did not ask Mr. Harlock to run the engine?

THE COURT: That is not the question. Read the question.

(Thereupon the last question was read by reporter.)

THE WITNESS: Yes, I do.

BY MR. GRIFFIN:

Q. And did Mr. Harlock say to you there was any problem with the seat swivelling in any respect?

A. No, he didn't.

Q. Did you observe any problem with the seat swivelling in the locomotive cab, any of the seats?

A. I didn't observe any problem, no.

Q. Did Mr. Harlock mention any problems relative to the emergency brake valve?

A. No, he didn't.

Q. You reported nothing, correct?

A. I reported nothing.

MR. GRIFFIN: May I have those engine reports, please? I would like to have marked, your Honor, two reports.

THE COURT: All right, Mr. Noel will mark them 3 and 4.

(Thereupon inspection reports referred to were marked Defendant's Exhibits 3 and 4 for identification.)

BY MR. GRIFFIN:

Q. Directing your attention to Defendant's Exhibits 3 and 4 I ask you if you recognize those forms?

A. Yes, I do.

Q. And --

A. I recognize the form, yes.

Q. And are those forms kept in the regular course of business of the Erie Lackawanna?

A. Yes, they are.

Q. Is it the regular course of business of the Erie Lackawanna that those forms be made out?

A. Yes, it is.

Q. And do those forms pertain to Engine 2500?

A. According to this, yes.

Q. And does Exhibit 3 — are these the forms that are used on the Erie Lackawanna for diesel equipment inspection report to be turned in by the engineer?

A. Yes, they are.

Q. And is Exhibit 3 such a report that was filed for Engine 2500 as of 8 A.M. on June 21, 1971?

A. Yes.

Q. And is Exhibit 4 such a report filed for Engine 2500 as of 3 P.M. on June 22, 1971?

A. Yes, that is what the form says.

Q. And the June 22, 1971 report, Number 4, would be the shift of duty immediately after the termination of your shift of duty, is that right?

A. Yes, sir.

Q. And you didn't file any report?

A. Just a moment -- well, yes, within a half hour.

Q. You didn't file any report at the close of your shift of duty after the accident, did you?

A. No, I didn't.

MR. GRIFFIN: I offer these in evidence?

MR. COLLINS, SR.: I object to them, your Honor. Self-serving and hearsay. I should have the right to cross examine anybody putting these reports out.

THE COURT: These are reports on this engine on the morning of the day in which Mr. Eggert started his shift and on the afternoon of the day in which he ended his shift?

MR. GRIFFIN: That is correct, your Honor. More than an

adequate foundation has been established to have them admitted in evidence, your Honor.

THE COURT: You are objecting, Mr. Collins?

MR. COLLINS, SR.: I am objecting to it.

THE COURT: Overruled.

(Defendant's Exhibits 3 and 4, previously marked for identification, were received and marked in evidence.)

MR. GRIFFIN: Before applying to have the jury view them, may I ask a couple more questions of the witness?

THE COURT: All right.

BY MR. GRIFFIN:

Q. Mr. Eggert, this form has a place at the top that says, "Repairs Needed," is that correct?

A. Yes.

Q. And on Exhibit 3, which is a record filed as of 8 A.M. on June 21st, it says repairs were needed "no radio" filled in?

A. That is what it says.

Q. That is the only entry, the only repair needed is "no radio," right?

A. I didn't make that report out.

Q. I am asking you to read the report with me so that we understand. Then on the report at 3 P.M. on June 22nd, the same entry is made, namely, "no radio," is that correct?

A. That is what the man has down there, yes.

Q. And there is no mention of any other problem, defect or anything wrong with the locomotive on either of these reports, is that correct?

A. There is nothing on the report, no.

Q. There is nothing other than a mention of the radio problem?

A. That is all that is on the report.

Q. Each of these are signed by an engineer, W.E. Binkert?

A. Yes.

Q. Of course, having worked on the railroad twenty years, you know who W.E. Binkert is, he is a fellow engineer?

A. Yes, he is.

MR. GRIFFIN: May these be shown to the jury?

THE COURT: Let me ask you this, Mr. Eggert. If it had come to your attention, as the engineer or to the attention of this other engineer, that there was a problem with the front seat, would that have been an item that should normally be reported in these forms?

THE WITNESS: If you were going to report something of that sort, yes, this would be the form used.

THE COURT: Would you report it?

THE WITNESS: We have had so much difficulty with the seats, and there has been nothing done, it is a waste of ink.

MR. GRIFFIN: I move that be stricken, if the Court please.

MR. COLLINS, SR.: It is responsive.

THE COURT: No, I won't strike it. You are saying that normally you would, but you are indicating or implying that this was a repetitive problem with no remedy, and consequently had this come to your attention, and you had the report form, you would not have put it down?

THE WITNESS: It is just a waste of time.

MR. GRIFFIN: Your Honor --

THE COURT: That is what you are saying, you are saying you wouldn't have put it down?

THE WITNESS: No, I wouldn't put it down unless the seat was on the floor.

THE COURT: You said something, you wouldn't put it down unless --

THE WITNESS: Unless it was on the floor.

THE COURT: On the floor, is that what you said?

THE WITNESS: Of the locomotive.

THE COURT: I see. That radio, is that "on the floor"?

THE WITNESS: No, the radio is as a rule in the short nose

of the locomotive, and the electrical wiring goes out to the receiver in the cab.

THE COURT: Would you as engineer normally report that trouble with the radio?

THE WITNESS: No, I wouldn't, that is an N&W band.

MR. GRIFFIN: I respectfully move to strike those remarks. I have to get into other things that are irrevelant in light of this, and the prior reports in which the seat was mentioned.

THE COURT: So be it.

MR. GRIFFIN: I don't think I should have to do that.

THE COURT: So be it. The jury's entitled to know how the system works or doesn't work.

MR. GRIFFIN: I am going to have to ask a question, your Honor, relating to another exhibit, and I don't want to be forced into doing it, I don't think it is relevant to the issues in this case. I don't want to have it regarded as opening up any other avenue of inquiry, but I will have to do it. Would you mark this?

(Thereupon inspection report referred to was marked Defendant's Exhibit 5 for identification.)

THE COURT: Hold your question until the jury looks at 3 and 4.

MR. GRIFFIN: Yes, your Honor.

(Thereupon Defendant's Exhibits 3 and 4 were displayed to the jury.)

MR. GRIFFIN: Your Honor, I don't want to appear to be impertinent or disagreeable. The questions I am going to ask right now I feel I shouldn't have to ask, but in light of the Court's questioning and the witness' response, I have to ask them, so I will.

BY MR. GRIFFIN:

Q. When Judge Elfvin asked you a question whether you would put down a problem with the seat, you said you don't put problems with the seat down unless the seat is off and laying on the floor?

A. It's got to be a pretty bad situation before I would report it.

THE COURT: That is what you meant when you said "on the floor," that you mean the seat would have to be down on the floor or is this a category of equipment that is on the floor?

THE WITNESS: No, I would report it if it were actually

off the standard and on the floor or if it were in very bad shape I would report it, yes.

THE COURT: You wouldn't report a radio because I thought you said that was not on the floor?

THE WITNESS: I wouldn't report a radio in an N&W engine because at that time we didn't have an N&W band in the yard. In other words, those radios were useless to us in the yard.

THE COURT: All right.

BY MR. GRIFFIN:

Q. Isn't that your job, Mr. Eggert, if there is something that you think is wrong with the equipment that you are operating, isn't it your job to report it so that it is fixed so that the next shift that comes on won't have to work with a locomotive with a problem, is that what the system is set up for?

A. Mr. Griffin, I would be reporting everything. I would be glad to fill it out from one end to the other if it were taken care of because I have to work on those, too. I like comfortable seats and comfortable locomotives, but they aren't taken care of.

Q. I thought you testified earlier, Mr. Eggert, that you would have reported the problem but you didn't have any forms?

A. I would have put down the sanders and adjust brakes.

Q. Forget about the sanders, I'm talking about the seat. Didn't you testify to Mr. Collins this morning that the reason that you didn't report the problem with the seat that you alleged you had was because there were no forms available, isn't that your sworn testimony?

A. Yes, it is.

Q. Didn't you intend to convey to this Court and jury that you were all set to report the problem with the seat, you didn't have a form, wasn't that what you tried to pursuade this jury?

MR. COLLINS, SR.: I object to Mr. Griffin badgering this witness.

MR. GRIFFIN: I am not badgering him, I want to get the truth.

THE COURT: Overruled.

BY MR. GRIFFIN:

Q. Isn't that the impression that you tried to convey this morning, that you would have reported a problem with the seat but you didn't have any forms?

A. I would have reported it, yes. I would have made a work report out, yes, because of having the injury. Yes, of course I would have.

Q. This slack that you claim you experienced, slack is a normal thing on the railroad, isn't it?

A. I don't know if you would call it normal, it is an everyday

occurrence, it is a job hazard.

MR. GRIFFIN: I move to strike the characterization.

BY MR. GRIFFIN:

Q. Didn't you testify last year when I asked you that the slack was a perfectly normal situation that you handled everyday?

A. It is within the job, yes. I don't say normal.

Q. Well, you don't claim there was any excessive speed on the locomotive?

A. At the time of the accident?

Q. Right.

A. No.

Q. The locomotive was moving along at a few miles an hour?

A. Yes.

Q. When you claim you had your accident?

A. Yes.

THE COURT: Let me ask you this about the same thing. You said there was no excessive speed, you had said that Mr. Kendall had throttled down, which I understand means decelerated?

THE WITNESS: Yes.

THE COURT: Was there any excess deceleration, did he decelerate too quickly for normal activity?

THE WITNESS: He decelerated fast, yes.

THE COURT: Are you making any claim in that regard?

MR. GRIFFIN: Your Honor, I've got enough to ask without -- excuse me. There is no claim in the case here that there was a deceleration. Now, I don't want to have to go on another --

THE COURT: I am interested in it and I think the jury is interested in it because of the slack operation. Isn't it true, Mr. Eggert, that you get this slack running in when you are stopping the engine?

THE WITNESS: Yes.

THE COURT: If you stop more quickly than normal you will get an excess of slack running in?

THE WITNESS: Yes, it would be severe.

THE COURT: I am trying to find out whether that is any part of your claim?

THE WITNESS: Well, he decelerated pretty fast when someone went out of sight -- he is supposed to stop when there is no one in sight.

THE COURT: Not what he is supposed to do, what did he do?

THE WITNESS: He decelerated fairly fast.

BY MR. GRIFFIN:

Q. Are you now contending that the man was operating the engine improperly decelerated the engine?

A. I would say he decelerated too fast, there would be other

ways of slowing down.

Q. For how long a time had he been decelerating in an improper way?

A. Not long.

THE COURT: You said he throttled down, is that all he did?

THE WITNESS: He throttled down.

THE COURT: Did he apply the brakes?

THE WITNESS: He must have applied the brakes.

THE COURT: Not must have.

THE WITNESS: Yes, he had to apply the brakes, the train stopped.

THE COURT: Is that before he throttled down? Now you are saying he throttled down and applied the brakes?

THE WITNESS: Yes, sir.

BY MR. GRIFFIN:

Q. The train hadn't stopped, it wasn't stopped at the time of your accident?

A. No, it wasn't.

Q. It was going a few miles an hour?

A. That is right.

Q. Didn't you testify that the slack action that night was a perfectly normal slack action?

A. If I testified to that, I'm sorry. That is wrong, it was

quite severe.

Q. Well, let's see what you said about slack a year ago. May I just have a minute, your Honor.

THE COURT: I seem to have introduced some new factors. This is a good opportunity to take our ten minute recess.

(Thereupon the court was in recess at 2:30 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:15 P.M.

(Jury present.)

THE COURT: All right.

MR. COLLINS, SR.: Dr. Godfrey.

MR. GRIFFIN: May it please the Court, I assume that the jury would understand that my questioning --

THE COURT: Yes. We have interrupted the cross examination of Mr. Eggert because Dr. Godfrey is here and has a busy schedule, and we want to accommodate him and get his testimony today in the case, and Mr. Griffin then will be picking up with his cross examination of Mr. Eggert at the same point where we stopped.

(Thereupon Joseph D. Godfrey, 7278 East Quaker Road, Orchard Park, New York, was called on behalf of the Plaintiff, and testified. This testimony has not been transcribed pursuant to the instructions of plaintiff's counsel.)

THE COURT: All right, Mr. Eggert.

T H O M A S W I L L I A M E G G E R T, called as a witness in his own behalf, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: You are still under oath, Mr. Eggert.

CROSS EXAMINATION BY MR. GRIFFIN (Cont'd.):

Q. Mr. Eggert, before the afternoon recess I was asking you about slack, whether or not any slack that you might have experienced on this move when Mr. Kendall was operating the locomotive was a normal amount of slack, and I will ask you whether you were asked these various questions on October 28th and 29th of last year. Please follow me. I am asking you whether you gave this testimony last year in October. First of all, starting at Page 137 at the bottom, Line 25:

"Q. Incidentally, slack, if there was any slack, slack is a normal thing in railroad switching moves?

A. Yes."

Were you asked that question and did you give that answer?

A. I believe I did. Yes, I did.

Q. That was your sworn testimony last year, right?

A. Yes.

Q. Now, starting at Page 185, Line 3, were you asked this question and did you give this answer?

"Q. You don't claim that there was anything unusual about the speed of the train on the evening of June 22, 1971, do you?

A. No."

Did you give that answer?

A. Yes.

Q. Now, then did Judge Elfvin ask you the following series of questions and did you give the following answers in response to questions by Judge Elfvin:

"THE COURT: All right. Mr. Eggert, was there also nothing irregular or unusual about the slacking in movement of the train?

THE WITNESS: Your Honor, this is something we deal with, you know, on a daily basis. I really -- we don't think too much about that.

THE COURT: Every time you start up with a string of

" cars you have a car by car reaction as they stretch out?

THE WITNESS: Exactly.

THE COURT: As you stop, the normal reaction of this slack is to run in and you get a progressive bumping that comes up and reaches the engine?

THE WITNESS: Exactly.

THE COURT: This is something that you expect in your switching operation?

THE WITNESS: Yes."

Were you asked those questions by the Court and did you give those answers last year?

A. Yes, I did.

Q. At Page 224, starting at Line 8, did Mr. Semple, your lawyer then, in your presence in this court say on your behalf, and I quote, "Mr. Eggert we admit has testified that slack action is a common occurrence on the railroad."

MR. COLLINS, SR.: I object to what Mr. Semple said during the previous trial.

THE COURT: Why?

MR. COLLINS, SR.: It is immaterial.

THE COURT: Why? He was representing Mr. Eggert.

MR. COLLINS, SR.: He was representing but we are getting into --

THE COURT: Mr. Eggert was in the courtroom at that time.

MR. COLLINS, SR.: We are getting into -- Mr. Griffin has a

misconception as between usual. We don't say the usual slack in the railroad isn't a violation of the Federal Employers Liability Act.

THE COURT: I will listen to argument later, Mr. Collins. Go ahead.

MR. COLLINS, SR.: Exception.

BY MR. GRIFFIN:

Q. Did your lawyer, standing here on October 29, 1975, in this very courtroom, in your presence, say, and I quote, "Mr. Eggert we admit has testified that slack action is a common occurrence on the railroad, there is no question about that. I don't think there is any dispute about that, as Mr. Griffin has said and as the Court has said." That was stated on your behalf in this courtroom a year ago?

A. I can't speak for what Mr. Semple said.

Q. Wasn't that stated here in your behalf after the testimony was made in this case?

A. I see it there, I see it written there, yes.

Q. And this is the transcript of the proceedings that was held last October in this courtroom, is that right?

A. Yes.

Q. I think you have previously identified Defendant's Exhibit 1 for identification, but I will ask you, Mr. Eggert, whether this photograph is a fair representation of the

cab of the Locomotive 2500 that you say you were in on the night of this accident, including the equipment therein, the seats and the various other things, were these all on the cab at the time, except this camera case that appears in the foreground, and except that the position of the seats according to your claim was not at any time exactly in the position as shown in here, is this a fair representation of the inside of the cab showing the equipment that existed as of the time that you claim you had your accident?

A. Yes. It is a fair description, yes. I can't say it is exactly.

THE COURT: Do you see any other differences, Mr. Eggert?

THE WITNESS: Any differences? I can't see any, your Honor.

THE COURT: Was the window opened or closed?

THE WITNESS: It is open.

THE COURT: That would be a difference?

THE WITNESS: Yes, it would.

THE COURT: You indicated the window was closed, that would be a difference?

THE WITNESS: Yes.

THE COURT: Anything more?

THE WITNESS: No. I can't see the seat bracket too well in this photo, so this could be different.

THE COURT: The seat bracket?

THE WITNESS: Well, the seat assembly, your Honor.

THE COURT: All right.

BY MR. GRIFFIN:

Q. Please compare Exhibit 25, your Exhibit 25 in evidence, with Defendant's Exhibit 1, other than the presence of the front seat, is there any difference in the two photographs?

A. The presence -- I'm sorry, the presence of the front seat?

Q. Yes. Defendant's Exhibit 1 has the front seat in place, does it not?

A. Yes.

Q. Exhibit 25 is a photograph of the same cab but the seat is out of the picture and removed from its stanchion?

A. Yes.

Q. Now, looking at Defendant's Exhibit 1, with the aid of your Exhibit 25, is it not the same cab?

A. It appears to be.

Q. You testified that Plaintiff's Exhibit 25 was the way the inside of N&W 2500 looked, right?

A. Well, more or less, yes.

MR. GRIFFIN: More or less. I will stand on the previous testimony. I would offer Defendant's Exhibit 1 in evidence, your Honor.

MR. COLLINS, SR.: No objection.

THE COURT: Defendant's Exhibit 1 received in evidence.

(Thereupon Defendant's Exhibit 1, previously marked for identification, was received and marked in evidence.)

BY MR. GRIFFIN:

Q. Now, in your Exhibit Number 25, I want to put from the top going down an arrow which would show where the actual angle cock and brake valve is of the emergency brake valve. Would you put on the top of it, starting from above it, put an arrow down on the exhibit?

A. Down to the valve?

Q. Yes, where the actual valve is, where you operate that emergency brake valve.

A. (Witness marks photograph.)

Q. You have now marked Exhibit 25. Up above would you put your initials, P.E., to show that it is your marking on Exhibit 25?

A. (Witness marks exhibit.)

Q. Now, the brake valve that you have marked on the locomotive was approximately six inches above the seat level on the night of the accident, was it not?

A. I'm not sure of the height of that valve.

Q. Didn't you testify previously in describing the various positions that the brake valve was approximately six inches above the level of the seat?

A. I may have.

Q. And it is your testimony, is it not, that when you contacted the brake valve you went down into the brake valve, is that your testimony?

A. Yes, it is.

Q. And it is your claim that the point on the engine that came in contact with your knee was the actual brake valve or lever, is that correct?

A. I don't know as I understand you. The point on the engine? The point on the engine that my --

Q. Yes. Isn't it your testimony and claim that your knee came in contact with the brake valve that you have indicated, that is where the contact was made?

A. That is what it felt like.

Q. That is what you testified to, right?

A. Yes.

Q. And I would be glad to find in the record the place where you previously testified that the level of that brake valve is six inches above the seat level. Do you need your recollection refreshed in any respect?

A. No, I don't deny that.

MR. COLLINS, SR.: I say find it if you can.

BY MR. GRIFFIN:

Q. You don't deny it. Then it is your testimony that to the best of your recollection the level of the brake lever that

you said you were in contact with is six inches above the seat?

A. I'm not sure, I don't know. I never measured it, I don't know.

Q. You say you never in all the times that you took pictures of these various engines, and so forth, you never measured the height above the seat level of the brake valve?

A. Not on the N&W 2500.

Q. I realize you couldn't find the N&W 2500. When you took pictures of other locomotives didn't you measure the distances?

A. No, I didn't.

Q. You were not interested in that?

A. I didn't measure it.

MR. GRIFFIN: May I have the photograph that he just marked, plus the one that has just been received in evidence, Exhibit 1, viewed by the jury, your Honor.

THE COURT: All right. I remind you also we are at four o'clock.

MR. GRIFFIN: All right, your Honor, I will spend the evening recess getting that exact point. May I hand back to the Court the original interrogatories?

THE COURT: Yes.

(Thereupon Plaintiff's Exhibit 25 in evidence and Defendant's Exhibit 1 in evidence were displayed to the jury.)

THE COURT: All right, we will recess at this time until nine o'clock tomorrow morning.

(Thereupon the jury exited the courtroom at 4:05 P.M.)

THE COURT: I want to note on the record, gentlemen, a couple of points in connection with our colloquy in chambers. This occurred during the mid-afternoon recess, and Mr. Griffin indicated that because of testimony given by Mr. Eggert, pursuant to my questioning immediately before the recess, that he felt that he would have to move for a mistrial in the case, and we considered among the three of us, Mr. Collins and Mr. Griffin and myself, the various aspects of that. All of us, except Mr. Collins, agree that this was an injection of a new claim or material into the lawsuit which might or might not be acceptable and become part of the lawsuit

through a motion to amend the pleadings to conform. Mr. Collins indicated that -- not so much that this was not something new in the case, he took the position that basically the slack run in was something inherently unsafe, and any aspect of a slack run in, abnormal or not, I take it, would be part of the case as it came to trial. We never had a formal motion for a mistrial nor any other formal motion. I indicated to Mr. Griffin that in my mind I saw no benefit to him of having any mistrial and a subsequent trial, because I could well envision that as it came into any such further trial that the pleadings would be altered with permission of the Court so that any new claims, such as Mr. Eggert testified about, would be part of the new trial. I offered to Mr. Griffin to be accommodating to him by way of any continuance or any special remedy he might need now, and we dropped the matter at that point. Now, either of you can add anything to that for the record that you want to.

MR. GRIFFIN: I would like to add the following comment, your Honor. In chambers following the

answers, which I regarded as highly prejudicial, made by Mr. Eggert relative to deceleration and unusual deceleration, things of that nature, I explained to the Court that I felt they were improper, that they were outside the scope of this case, they were outside the pleadings, they were outside the admissions that had been made by the plaintiff and his counsel, and that he injected something that was not in the case, and it was not attempted to be brought in on direct examination in any respect. I indicated that I felt that that material should be stricken one hundred percent, but that I did not think the prejudice and damage to the defendant could be cured by a mere instruction to ignore. I therefore indicated to the Court that it was my intention to move for a mistrial. We had a discussion along the lines that the Court has referred to, and I then concluded after the discussion by saying that I would like to reserve overnight my right to make such an application in the morning so that I would have an opportunity to further reflect and

confer with my client as to what has occurred, and the nature and the extend of the prejudice and what my client desires me to do under the circumstances.

THE COURT: All right. Do you want to add anything relative to what was said in chambers?

MR. COLLINS, SR.: I think, your Honor, as far as amending our answers to the interrogatories, I think that I will make the motion following the case --

THE COURT: All I want now on the record is a relfection of what happened in chambers.

MR. COLLINS, SR.: It was --

THE COURT: Anything that you are going to do in the future as far as making any motions, we will leave that to the time you make them. I won't take that now.

MR. COLLINS, SR.: My contention in chambers was that merely because somebody refers to a slack action as being normal doesn't take it outside of the FELA, and it isn't the same thing as being safe because it is normal. The railroad operates, in my opinion, in many usual ways which are unsafe.

THE COURT: That was your position?

MR. COLLINS, SR.: That is my position.

THE COURT: All right, tomorrow morning.

MR. COLLINS, SR.: May I submit a trial memorandum that I would like to make part of the record, a trial memorandum that we have given Mr. Griffin a copy of?

THE COURT: Sure.

MR. COLLINS, SR.: Stating our position on the Boiler Inspection Act.

THE COURT: Sure.

(Thereupon the court was in recess at 4:12 P.M.)

Transcript of Proceedings, October 7, 1976.

VOLUME III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT,

Plaintiff,

-vs- CIVIL 73-370

NORFOLK & WESTERN RAILWAY COMPANY, and
ERIE LACKAWANNA RAILWAY COMPANY,

Defendants.

PROCEEDINGS OF OCTOBER 7, 1976

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Transcript of Proceedings, October 7, 1976.

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9 A.M.

(Jury absent.)

THE COURT: Mr. Griffin?

MR. GRIFFIN: Good morning, your Honor. May it please the Court, at this time on behalf of the defendants, I would respectfully move the Court to strike from the record any and all answers and testimony given by the plaintiff yesterday afternoon in response to questions by the Court as to the speed of the train and throttling and change of movement relative to the slack or the causes of the slack or how the slack operated, and I further move that the Court instruct the jury to disregard any such testimony, and that the same is to be completely taken out of their minds, and not to be considered in any regard in this case, and is expunged from the record. The basis of the motion is the following, your Honor. There was no claim in this case that the movement of the train or the slack was negligence, that the engineer was negligent in any respect in the operation

of the train. On the first trial it was expressly testified in a number of respects that the slack was perfectly normal and that it was admitted by counsel on behalf of the plaintiff that it was normal, that there has been no application to vacate that express admission which was taken out of this case. When the case went to the Second Circuit, the Second Circuit in effect stated slack was normal, there was no issue relative to the movement of the train that was before this Court, that upon direct examination there was no eliciting of any such testimony. There has been no application to vacate the prior testimony or admission or stipulation on the part of the plaintiff to apply to the Court for a new and different theory, which has never been inserted in the case, and furthermore, as the Supreme Court has expressly stated in Herdman versus Pennsylvania Railroad, 352 United States 520, that there is no evidence to show that unscheduled or sudden stops of trains are unusual or extraordinary occurrences. The only evidence was petitioner's testimony that they are not

unusual or extraordinary. The petitioner in that case testified that 'We've got to expect them or think about them.' I have cited this in my requests to charge, which I will hand to the Court, and give a copy to Mr. Collins. I apologize for not having the time to get a cover on it. So for all those reasons, and on those grounds and because of the prejudice to the defendant in inserting this gratuitous, unexpected, unpleaded theory into the case, I move very strongly to strike all of such testimony, and that the jury be instructed to completely and totally disregard the answers that were given in response to the Court's questions, wherein the plaintiff volunteered these matters.

MR. COLLINS, SR.: Judge Hayes in his decision stated, "The engine was slowing down -- this is at Page 4441 of the decision handed down this June -- the engine was slowing down at this moment and as Eggert was moving between seats the slack action caused by the momentum of the coupled cars bumping into the decelerating locomotive knocked him off balance and he

fell onto the brake valve lever in the engine cab injuring his knee." It was argued in the Circuit Court.

THE COURT: Nothing was argued about unusual motion or deceleration. There is nothing in the opinion about it, there was nothing in the first case about it.

MR. COLLINS, JR.: He mentioned the slack action because --

THE COURT: I am talking about unusual. Mr. Eggert said --

MR. COLLINS, JR.: I did argue it.

THE COURT: -- he said there was an unusually severe slack action. The opinion makes no mention of it. The first trial made no mention of it.

MR. COLLINS, JR.: Your Honor, what I argued to the Second Circuit --

THE COURT: How do I know what you argued in the Second Circuit. The court didn't deal with it, so what?

MR. COLLINS, JR.: I argued that slack action may be a normal occasion on the railroad but the fact that a man is thrown across the cab of the engine isn't normal. That was the question of the slack action. Slack action happens everyday,

and that is what the court is talking about here when they say at Page 4441, "The slack action caused by the momentum of the coupled cars bumping into the decelerating locomotive knocked him off balance," that is exactly what I told them, and that is exactly what they put in their opinion.

THE COURT: They come down to a but for argument, but for the fact that he was on his feet changing seats just when the slack action occurred, he wouldn't have been knocked off his feet.

MR. COLLINS, JR.: That is the concurring opinion, that is not the majority opinion of the Circuit Court. Judge Mansfield in concurring accepts Mr. Griffin's but for argument.

THE COURT: No, he says what the majority is doing is relying on the but for argument.

MR. COLLINS, JR.: The majority mentions slack action. I argued it to them, I said it was in the case.

THE COURT: There is no question about slack action being in the case. The question is whether we have an abnormality of the operation of the engine in such a way to decelerate too severely which, as Mr. Eggert said, caused an abnormal or severe slack action. That is

not anywhere in the opinion, is wasn't anywhere in the case until Mr. Eggert so responded to my question.

MR. COLLINS, JR.: Your Honor, we respectfully submit that the slack action was brought, it is in the case, it is a question of fact for the jury.

THE COURT: I can't get you to differentiate between slack action per se, which is in most of the operations of the railroad in yard switching and classifying, between that and something abnormally severe, something that is caused by -- well, such as an engine running into the back of something which would cause a slack action to come behind it or putting on its brakes abruptly which would cause a severe slack action on the run-in as opposed to the normal, tolerable, expected slack run-in which you are going to get most of the time when you are stopping the train.

MR. COLLINS, SR.: I say there is no tolerable slack action, that is something for the jury to decide.

THE COURT: If that is your position, slack action per se is not tolerable, so be it.

MR. COLLINS, SR. And, your Honor, at this time --

THE COURT: I want to know whether that is your position

or whether you are taking a further position and indicating there was something wrong in Mr. Kendall's operation of the engine which caused an unduly severe run-in?

MR. COLLINS, JR.: Our position is that slack action is a normal occurrence on the railroad, everybody knows it happens, but under the facts of this circumstance the slack running in threw Mr. Eggert against a brake valve. The question of whether --

THE COURT: All right, you are not saying then that the slack action was in this case in any way abnormally severe, but the slack action was the causation of Mr. Eggert being thrown against the back of the seat and around into the valve and onto the floor.

MR. COLLINS, JR.: Your Honor, we are not saying -- you don't -- abnormally severe is relative. I think in this case it probably was abnormally severe because it threw Mr. Eggert to the floor. In other situations it may not be abnormally severe. We are talking about one particular case. We are saying that the slack action in this case was a contributing factor to Mr. Eggert being hurt. That is

our claim. Whether or not --

THE COURT: You are saying if it hadn't been abnormally severe it wouldn't have thrown him to the floor?

MR. COLLINS, JR.: That is our claim.

THE COURT: Your position is what happened here was abnormal, caused by a wrongful or negligent operation of the locomotive in decelerating too sharply or too quickly, which would create an abnormally severe slack run-in?

MR. COLLINS, JR.: Your Honor, that is one of the causes, that could cause it. Also it could be caused by the brakemen on the ground, the makeup of the train, air --

THE COURT: Those are --

MR. COLLINS, JR.: There is a lot of causes for slack action. We are saying the slack threw Mr. Eggert to the ground.

THE COURT: Are you saying it was an abnormally severe slack run-in?

MR. COLLINS, JR.: In this circumstance we are saying it was, that it forced Mr. Eggert to the ground.

THE COURT: If it had been just a normal slack run-in, that would not have caused him to be thrown to the ground?

MR. COLLINS, JR.: We are saying that it is a contributing factor, with the broken seat, obviously. We are saying that a man isn't thrown around the cab of an engine when slack comes in normally. When he gets throuwn around the cab of an engine from slack coming in, there is something wrong, there is some negligence on the part of the railroad. When he testifies that the slack came in and threw him then the jury can consider it as a question of fact, whether that was negligence on the part of the railroad.

THE COURT: Nothing to do with the seat, however?

MR. COLLINS, JR.: Your Honor, the seat was a contributing cause also because we are arguing that that comes under the Boiler Inspection Act.

THE COURT: If it doesn't enter into the causation, then it doesn't matter whether it is under the Boiler Inspection Act or not.

MR. COLLINS, JR.: It is our position that the railroad furnished an unsafe locomotive, which was caused unnecessary peril to life and limb, and ordered the man to work on it.

THE COURT: If that condition had nothing to do with the accident and injury, then it doesn't matter

whether it is covered by the Act or not.

MR. COLLINS, JR.: That is a question of fact for the jury.

THE COURT: No, not if it's not your claim.

MR. COLLINS, JR.: It is our claim that the railroad furnished an unsafe locomotive on that evening, it was an unnecessary peril to life and limb.

THE COURT: I have difficulty seeing what your position is.

MR. COLLINS, JR.: There wasn't one cause of this accident, there was the slack action, the defective seat, there was a protruding, unguarded brake valve, there is quite a bit of evidence of negligence here. Our claim is that the railroad violated the Boiler Inspection Act, they gave an unsafe engine that wasn't properly suited for what it was supposed to do, it caused unnecessary peril to life and limb. The defective seat, which is part of the engine, was defective, the brake valve was in a dangerous condition, in violation of the Federal Boiler Inspection Act, and an illegal act on the part of the railroad, negligence per se, if the jury finds that brake valve or seat contributed in the slightest manner to Mr. Eggert's

injuries. Secondly, we are claiming also under the FELA that they had an obligation to provide him a safe place to work, and the allegation of negligence as to the slack action throwing him across the cab are also questions of negligence in this case. There's two claims, the Boiler Inspection violation and an FELA violation. That is our claim in this case. Those are questions we are submitting and questions of fact for the jury to properly determine. I have cited the Court Calabredo and Whalen which are the affirmative rules of the Second Circuit on the Boiler Inspection Act. I am sure that the Court is aware of the requirements under the FELA. I have cited the cases to the court.

THE COURT: We seem, however, to have taken the seat out of the case. We seem now, if I understand your position, to be saying that the causation of Mr. Eggert's being thrown within the cab was the excess of slack caused by the improper operation of the locomotive, the seat itself entered into it not at all. Now, the valve, if there be something improper

with the positioning of the valve, of course, would enter into the cause, if so, it would have added to the severity of the injury, has nothing to do with the causation of his being thrown, but was there to be hit by his knee and therefore aggravated the injury, and consequently, if there be anything to your position on it, there it is, but the seat seems to be out of the case now.

MR. COLLINS, JR.: Absolutely wrong. There's two claims, the Boiler Inspection violation --

THE COURT: How did the seat cause the accident?

MR. COLLINS, JR.: There was a defective seat. The question of fact for the jury is whether or not the railroad performed a proper inspection, whether that engine was safe to perform the job it was supposed to do on the railroad. Our claim is that locomotive wasn't safe, it had a defective seat, the defective seat caused unnecessary peril to life and limb.

THE COURT: If it did -- this is what I'm trying to find out -- how did the seat cause the accident?

MR. COLLINS, JR.: Your Honor, because it put him in a dangerous

position, it made him sit in one seat, it was cocked, it forced him to fall. It is a question of fact --

THE COURT: There was nothing wrong with him or unsafe in his position while he was seated in the seat. The circumstance was that he was standing on his feet at the time of the slack run-in, at the time of this abnormal slack run-in, which knocked him off his feet and into the negligently protruding valve, taking your position.

MR. COLLINS, JR.: The seat also forced him to -- he testified that he had to sit in a seat he usually doesn't sit in, because the way the seat was turned he couldn't properly position himself, and because the seat was defective he had to get up to take signals to pass to the engineer. The seat is definitely in the case. The Second Circuit said it was in the case. We are saying now, and the law is so perfectly clear, that the seat presents a question of the Boiler Inspection Act. We say that if the jury finds, even in the slightest degree, that that seat was defective, and the railroad sent him out to

work with that defective seat, that that seat was part of the engine, the railroad committed an illegal act, and they are liable to Mr. Eggert for forcing him to work with an unsafe engine. That is the question the jury has to find. We say because the seat was defective and they sent him out, it was unsafe, and that is the question we put to the jury. We say because it was unsafe it created an unnecessary peril to life and limb.

THE COURT: Even though in itself it had nothing to do with the accident?

MR. COLLINS, JR.: We are not saying that. We are saying the seat contributed to the accident. If Mr. Eggert had to sit in the wrong seat because that was defective, if it was turned so he couldn't get his knees in there, if he had to get out of that seat to move to the other because that one was defective, those are questions of fact for the jury, and if they find it was defective, then there is a violation of the Boiler Inspection Act and there is absolute liability on the railroad. That is the first part of our case. The brake valve is also a dangerous object on the

locomotive the way it was positioned in this case, the way it could have been positioned, that is the second part of our Boiler Inspection claim, and the other claim in the case is the FELA violation, and the railroad didn't provide a safe place to work, and the claim that comes in under that is the slack action coming in from the cars and throwing Mr. Eggert around the cab of the engine. There's two claims here, there is not just an FELA claim, there's a Boiler Inspection Act claim.

THE COURT: I understand that.

MR. COLLINS, JR.: That is our claim on the seat and the protruding brake valve. They present questions of fact for the jury.

THE COURT: What about the unsafe place to work? How does this single instance, which is all we have, the single instance of an improper operation of a locomotive make it an unsafe place to work?

MR. COLLINS, JR.: Your Honor, if the slack run-in was what caused Mr. Eggert to fall, in addition to there being a defective brake valve, in addition to having a Boiler Inspection violation, you

have an unsafe place to work.

THE COURT: There is a single instance of occurrence, how does that amount to an employer providing an unsafe place to work?

MR. COLLINS, JR.: Your Honor, in Rogers versus Missouri the Supreme Court said the slightest evidence of negligence -- they found oil on a cross tie -- the one incident of the slack running and throwing him is the evidence we say is negligence, which did not provide him a safe place to work.

THE COURT: If they, the employer, had permitted Kendall to operate the engine knowing that Kendall was inexperienced and inept in the operation of the locomotive, that would have constituted providing an unsafe place to work, not providing a safe place to work, but I ask again, here we have, according to all we have in the case, we have a single episode of an improper operation of a locomotive producing the abnormally severe run-in, how does that -- is it your claim that that single incident makes the employer liable for not having provided a safe place to work?

MR. COLLINS, JR.: That is the law, your Honor. If that single

incident --

THE COURT: That is your claim?

MR. COLLINS, JR.: If that incident contributed in any way to Mr. Eggert's injury, then our claim is that that was negligence and --

THE COURT: I know, I accept it as being negligence, but this is different from not providing a safe place to work.

MR. COLLINS, JR.: Your Honor, is it the Court's position that a man getting thrown around an engine has a safe place to work if slack runs in? I don't understand the Court's position.

THE COURT: I don't have a position, I am trying to find out your position.

MR. COLLINS, JR.: Our position is that you shouldn't be thrown around an engine by slack.

THE COURT: I want to know your theory. Is it that this is not a safe place to work or is it that it is negligence on the part of the railroad exhibit through the actions of Mr. Kendall, its employee?

MR. COLLINS, JR.: Your Honor, the FELA requires that the railroad provide a safe place to work, that is the language.

THE COURT: And also not be negligent?

MR. COLLINS, JR.: Yes. If the railroad is in any way negligent which causes injury, then the question arises whether the railroad provided a safe place to work under the FELA, if the negligence causes the injury.

THE COURT: This is what I have difficulty in accepting, a single episode of negligence, which understandably could make the railroad liable, is the same thing as not providing a safe place to work; not oil on the track or ice on a platform or any other thing you want to talk about, which is a continuing condition, or a condition where, as in the brake valve, you are alleging that it improperly protruded, or if they put Mr. Kendall in charge of the locomotive knowing that he didn't have the skill and aptitude to manage a locomotive, these things would constitute failing to provide a safe place to work, which would make them liable. They would also be liable, according to my understanding, even if they provided a safe place to work if there was any episode of action or omission which was negligent on the part of the railroad, exhibited, as it must be,

through its employees which cause the accident. Now, I think what you are talking about when you are talking about the slack run-in and the improper operation of the locomotive, I think you are talking about a single act of negligence on the part of the railroad.

MR. COLLINS, JR.: Yes, your Honor.

THE COURT: When you are talking about the seat, if that was part of the causation, and you are talking about the protruding brake valve, which would be part of the causation of the aggrevated and more severe injuries, then you are talking about failing to provide a safe place to work.

MR. COLLINS, JR.: Your Honor, we are talking about Boiler Inspection Act when we talk about the seat.

THE COURT: I know. It doesn't matter --

MR. COLLINS, JR.: It does matter. We are saying one act of negligence that contributed in any way, in the slightest way, to Mr. Eggert's injury in this case, the slack action throwing him around in the engine is a violation of the railroad's obligation to provide a safe place to work. I don't care if it only

happened once.

THE COURT: You seem to be unable to disassociate the two. I take it your position is that they are not disassociated?

MR. COLLINS, JR.: They are not.

THE COURT: A single act of negligence must always be the same as not providing a safe place to work?

MR. COLLINS, JR.: If the single act of negligence causes the injury which the employee is claiming, that is the distinguishing factor.

THE COURT: In either situation you have to have causation.

MR. COLLINS, JR.: Yes, your Honor.

THE COURT: So we will put that aside. Now you are talking about what the wrongful act is?

MR. COLLINS, JR.: Yes.

THE COURT: You are saying that the single act of negligence is exactly the same thing always as failing to provide a safe place to work?

MR. COLLINS, JR.: Exactly, your Honor.

THE COURT: I wanted to know your position. That is your position, okay.

MR. COLLINS, JR.: Your Honor, as far as the qualitative term "failing to provide a safe place to work," that is written in the law. What is the

failure to provide a safe place to work? It is sending a man out on an engine when he stands on the engine and the slack runs in he gets hurt, that is the unsafe place to work. We are not talking about a general picture, we are talking about an incident.

THE COURT: Let me clarify this, and I thought we had, but we seem to be getting back again. You are saying in your last comment, if I understand it, that normal slack run-in makes the engine an unsafe place to work?

MR. COLLINS, JR.: No, your Honor, the Court is mistaking our position.

THE COURT: All right.

MR. COLLINS, JR.: Our position, your Honor, is that slack action is a normal occurrence on the railroad, we concede that.

THE COURT: It doesn't make --

MR. COLLINS, JR.: But --

THE COURT: It doesn't represent any part of unsafeness of a place to work.

MR. COLLINS, JR.: That is too general. Slack action is a normal occurrence period, it doesn't mean it is safe. The fact of this case is that the slack action was not normal because it

threw Mr. Eggert across the cab. We agree there is slack action on the railroad every-day, but in this case the slack action wasn't normal, it threw Mr. Eggert across the cab.

THE COURT: Because it was more severe.

MR. COLLINS, JR.: Whatever it was, he said it was coming in and it threw him down, that is what we are claiming is the negligent act under the FELA in this case.

THE COURT: If you had normal slack run-in, and we agree that that in and of itself does not constitute making a working place unsafe, how can it become unsafe if it has a bad effect, how can you gauge the causation by the effect?

MR. COLLINS, JR.: Your Honor, if a man gets injured, obviously the slack wasn't normal, it wasn't a normal run-in, something was abnormal about it, because the men working on the railroad, walking around a cab, if they get knocked on the floor when the slack runs in, there is something wrong.

THE COURT: All right. That is all I wanted to find out. Your position is grounded on abnormally severe slack run-in?

MR. COLLINS, JR.: Not abnormally severe, your Honor. I don't

know why you want to categorize it as that. We are saying under the facts of this case the slack ran in and caused Mr. Eggert to -- it threw Mr. Eggert. Now, if you want to call it abnormally severe --

THE COURT: You are saying it wouldn't have thrown him if it hadn't been abnormally severe.

MR. COLLINS, JR.: I am saying in this case the slack threw Mr. Eggert, whatever the Court wants to call it.

THE COURT: You know, it is necessary for me to know what your position is, what your claims are, and it is vitally necessary for Mr. Griffin to know what your claims are. Of course, he has a very tenable ground at this point of saying he has been completely surprised by this interjected wrongful action or operation of the locomotive and abnormally severe run-in.

MR. COLLINS, JR.: Your Honor, he said that at the last trial. You denied his motion to exclude that and said it was a question of credibility for the jury. Mr. Griffin said he moves to exclude the slack action, and it was pointed out that it came out in the E.B.T., and you

denied his motion and said that is a question of credibility for the jury whether or not Mr. Eggert changed his story as to the slack action. He isn't surprised, he heard me argue it in the Second Circuit. He knows there has been a Boiler Inspection violation.

THE COURT: Mr. Collins, you have to admit, I believe, even though you were there and I was not, that there was nothing said there about any wrongful operation of the locomotive by Mr. Kendall.

MR. COLLINS, JR.: Your Honor, if I had my brief I would show you. If you take the facts of this case, the fact that the slack ran in and caused Mr. Eggert to fall is enough of a question of fact of negligence under the FELA to put to the jury, and that is what the court is saying in that opinion.

THE COURT: That may be, but you are not answering my question, that is, my surmise, my assumption is that nothing was said on appeal to the Court of Appeals in any way attributing any negligence to Mr. Kendall, and consequently to his employer, the railroad, in the operation of the locomotive.

MR. COLLINS, JR.: Your Honor, is it the Court's request that we make a motion to amend our pleadings, to say the railroad and its employees were negligent in causing the slack action to run-in?

THE COURT: Obviously, if I don't strike, if I don't grant the motion to strike, you are going to have to move to amend, but I assume you will.

MR. COLLINS, JR.: Yes, your Honor.

THE COURT: If I grant the move to strike, of course, I wouldn't grant any amendment.

MR. COLLINS, JR.: Okay, your Honor. Now, allegation Number 5, "Among other things, the defendant Erie Lackawanna Railroad Company did not provide the proper type of yard switching locomotive for the job which the plaintiff and his crew were ordered to do," which has to do only with the fact that in this type of engine they have two seats on the left hand side instead of a single seat on the left hand side where the fireman would ordinarily sit, because on the road engine one of the ground crew sits in there also. The rest of that allegation says, "The locomotive the plaintiff was operating was a road locomotive,

not properly suited for yard switching work." Now, there is a claim that the engine didn't properly decelerate, that as it was coming in the slack ran in, and the question becomes whether the railroad should have given a yard engine or road engine. It is in the pleadings.

THE COURT: We have no testimony in the case on this. We would need expert testimony, but it would seem to me that any such testimony would show that a road engine would not brake as abruptly, would not have the same mass or gross weight, it would have a greater mass or gross weight than a yard engine, with the consequence that the braking action by a road engine would normally be less severe and produce less run-in, and having a greater mass or weight it would minimize the effect of any run-in. I think that is what your testimony would be. But there is nothing in the case yet on it.

MR. COLLINS, JR.: Your Honor, I just don't understand the Court's position.

THE COURT: All I am saying is that all you have talked about thus far in the evidence, as far as

relating to the utilization of a road engine as opposed to the yard engine, is the fact that it had two seats on the left side, thereby not enabling Mr. Eggert to perform his -- who was performing as a fireman to sit in the single seat where he could have his legs stretched out and not hit upon the seat in the front with the canted back, and consequently he had to sit in the front seat, and consequently when he stood to look out in back, he had to get up from the front seat and walk to the back seat, and in the process of it he was knocked to the ground.

MR. COLLINS, JR.: Yes.

THE COURT: That is all I have heard about road engines.

MR. COLLINS, JR.: Yes, your Honor. Well, your Honor, if you want it for the record, we will put in the difference between a yard engine and a road engine, why the yard engine is involved in yard switching. It should be in the case, it is in the pleadings. I didn't know it wasn't in the case. Referring to the first trial, on Page 56, Mr. Griffin got up and said, "If the Court please, perhaps I should

have been up sooner. I again object to all this claim on the grounds it was never asserted in the formal pleadings in this court now in the answers to interrogatories. I move to strike this testimony on the ground it was never asserted. There was never any amendment to it or any advise such a claim would be asserted." The Court said, "The same ruling. I will allow it in, overruled."

THE COURT: That is the claim on the slack.

MR. COLLINS, JR.: Yes. We went to the Second Circuit and Mr. Griffin didn't argue that you were in error on that.

THE COURT: We are not talking about that. We are not talking about whether or not slack run-in is properly in the case, it is. Now, the question is negligent operation of the locomotive in the case.

MR. COLLINS, JR.: Your Honor, how did the slack negligently run-in?

THE COURT: It always runs in, any time you stop an engine it runs in, doesn't it?

MR. COLLINS, SR.: Your Honor, I don't think you can classify slack as normal, abnormal, where does the standard start?

THE COURT: Mr. Eggert has, and you did on the first trial.

MR. COLLINS, SR.: How do you divide it, what is normal?

THE COURT: Your son accepts the fact that there is a normalcy of run-in, I don't know why you can't.

MR. COLLINS, JR.: In this case I don't accept it.

THE COURT: Because it was abnormal.

MR. COLLINS, JR.: Because it forced him to the ground.

MR. COLLINS, SR.: How do you set a standard, where is the breaking off point when it becomes abnormal, when does it start?

THE COURT: That is for the jury to decide.

MR. COLLINS, JR.: Your Honor, it is our claim that it was abnormal, it knocked him off the seat. We testified it was abnormal, we met the preponderance of evidence. Let the railroad come on and prove it wasn't abnormal. We are supposed to be given the most liberal view as the plaintiff.

THE COURT: First of all, I am trying to understand your position and get it clarified. It seems to be clarified that you are contending that there was some negligence on the part of Mr. Kendall in the operation of the

locomotive, in decelerating too quickly, which produced a run-in which was harder and more severe than usual. Consequently, tied with the fact that he was on his feet because of the improperly operating chair, he was thrown to the ground or against the valve and to the ground, and his injuries were aggrevated because of the improperly protruding brake valve. Does that state your position?

MR. COLLINS, SR.: I don't agree with your position that his injuries were aggrevated because of the protruding brake valve.

THE COURT: Weren't they?

MR. COLLINS, SR.: They were caused by it, not aggrevated.

THE COURT: If it hadn't been protruding, if it had been a bulkhead with no valve, he would have sustained some injury.

MR. COLLINS, SR.: Not necessarily.

THE COURT: Maybe not enough to go to court on, always there is some injury. Now, the fact that there was a protruding valve there with a point on it that hit into his knee, caused him to sustain severe injury.

MR. COLLINS, JR.: Right. He didn't aggrevate it, it caused it.

THE COURT: No, it didn't. The valve didn't cause him

to fall.

MR. COLLINS, JR.: Right. The knee was okay before it hit on the valve. We are saying that valve -- you can call it aggrevation of whatever you want -- it caused that injury.

THE COURT: The valve was no part of the activating force.

MR. COLLINS, JR.: Yes, it was a violation of the Boiler Inspection Act.

THE COURT: That doesn't matter. It may be a violation, but if it doesn't enter into causation it gets you nowhere. It didn't cause him to his his knee, it is what he hit his knee on. What caused him to hit his knee was the fact you had an improperly operating seat or non-operating seat which caused him to be on his feet at the time Kendall negligently operated the locomotive, causing an abnormal run-in that caused Mr. Eggert to be thrown. Then from that point we have the valve improperly protruding, which hits into his knee and which causes him severe injury, whereas if it hadn't been improperly protruding he would have had very minimal damage.

MR. COLLINS, SR.: That is our position. We don't say it aggrevated a condition because he fell. If there was a pit below there and the railroad hadn't guarded that, we wouldn't say the pit was an aggrevation. If the man is injured because of that unsafe condition, we are saying that is the cause of it.

THE COURT: Aggrevation is a term I ought not use. Aggrevation is when you have one injury and aggrevate it in some way.

MR. COLLINS, JR.: Your Honor, our first claim is the Boiler Inspection Act was violated, and the fact that valve protruded, and the fact that seat was defective, that we claim rendered that engine unsafe for operation and was an unnecessary peril to life or limb, and if the jury finds even the slightest connection between those alleged defects and the injury, then it is absolute liability.

THE COURT: Now you are getting back to a position again where you have left out of the picture any improper operation of the locomotive.

MR. COLLINS, JR.: Your Honor, you don't need the improper locomotive operation.

THE COURT: You agree that that is what you have now

come back to?

MR. COLLINS, JR.: No, we have two claims. We have the Boiler Inspection claim, which the jury must consider, and we have the FELA. There's two claims. The court is confusing them. We don't need the slack action or anything to show a Boiler Inspection. If that jury says that Mr. Eggert was forced out on that engine, it was unsafe when he got on it, and the unsafeness, the unnecessary peril to life and limb caused -- was in any way the slightest cause of that injury, on the facts, then you have a Boiler Inspection Act. I don't care if the slack ran in for twenty years. We have a Federal Boiler Inspection Act violation, absolute liability on the railroad, no comparitive negligence, nothing, it is a violation of the law. We are saying first the railroad violated the law, then they also gave an unsafe place to work, two claims in this lawsuit. My opinion is that the jury is going to find a Boiler Inspection violation. If you want to get to the second claim, that is what we are arguing now, the slack.

THE COURT: In either situation you do admit from your statement that there has to be some degree or quantity of causation?

MR. COLLINS, JR.: Even the slightest. We admit the defective seat -- we admit -- our position is the defective seat and the brake valve were violations of the law, no matter if there was an accident or not. Now, there was an accident, and as far as liability, the two violations of the law, if they contributed even in the slightest way, if the jury finds just because the seat was bent a little or wouldn't swivel and that contributed to Mr. Eggert hurting his knee on that brake valve, then we have an absolute liability case with a violation of the Boiler Inspection Act because those are both parts of that engine, and the law says that engine has to be safe and not an unnecessary peril to life or limb. So that is the first claim. It is pretty concise.

MR. COLLINS, SR.: Your Honor, there is no such thing as proximate cause in this, just any degree, that is the Supreme Court ruling. Proximate cause -- the old common-law theory of proximate cause

has been thrown out by the Supreme Court, and it says in any way contributes or causes.

THE COURT: It hasn't been thrown out. Proximate cause has to be there.

MR. COLLINS, SR.: They rule out proximate cause. I can give you the citation. Justice Frankfurter -- they state there is no such thing as the old common law of proximate cause.

MR. COLLINS, JR.: Rogers versus Missouri --

THE COURT: Causation, whatever happened has to be somewhat causative of the injury.

MR. COLLINS, SR.: Or contributes to it.

THE COURT: All right, contributorily cause it then.

MR. COLLINS, SR.: It says --

THE COURT: Contribute to or cause it. In any way cause it or contribute to the cause. There is nothing -- that doesn't run into the face of proximate cause, you are saying the same thing.

MR. COLLINS, SR.: It does, the Supreme Court says proximate cause is no longer in it. They have thrown that out. It is in any way contribute --

THE COURT: They might have thrown out the element of foreseeability.

MR. COLLINS, SR.: I'm talking about proximate cause in itself. That is the very language of the court. I will give it to you this afternoon.

THE COURT: Well, I have no problem with the concept. I won't worry about the sematics. There is no question in my mind that if anything is wrong there can't be a recovery until and unless whatever was wrong in some way and in some degree, no matter how small, caused the injury. You call it what you want, that is what it is.

MR. COLLINS, JR.: The court talked about it at Page 442. Just before we finish I want to put Calabredo versus New York, New Haven & Hartford Railroad Company on the record, 287 Fed. 2nd 394, 1961, and Whelan versus Penn Central, 503 Fed. 2nd 886, 1974. Two Second Circuit cases. In Calabredo, Justice Clarke said, talking about the Boiler Inspection Act, "The statute itself contains no such limitations as to what type of violation he is talking about should be on an engine, instead requires all locomotives and there parts and pertinences to be in proper condition and safe to operate without unnecessary

peril to life or limb." That is the Boiler Inspection Act, and that is what we are claiming happened in this case.

THE COURT: I have no problem with that.

MR. COLLINS, JR.: Okay. That is what we are going to request the court to charge.

THE COURT: I have no problem with that. I don't know what I will charge. The concept doesn't leave me chilled or cold or --

MR. COLLINS, JR.: We admit it is a liberal standard.

THE COURT: I have no problem with that. I do still have a problem grasping what your position is as far as any negligent operation of the locomotive.

MR. COLLINS, JR.: Your Honor, our claim is there was an abnormal -- you call it abnormal -- our claim is that the slack --

THE COURT: Was there a negligent operation of the locomotive or wasn't there?

MR. COLLINS, JR.: There was negligence on the part of the railroad and its employee. If you want me to amend it, I will amend it.

THE COURT: Is it your claim that Kendall was negligent in operating the locomotive?

MR. COLLINS, JR.: Your Honor, it is our --

Transcript of Proceedings, October 7, 1976.

MR. COLLINS, SR.: Our claim is it is up to the jury to determine from the facts.

THE COURT: Not unless I allow it in the case, and I won't allow it in the case unless I know it is your claim.

MR. COLLINS, SR.: We are not limiting it to the locomotive. We are saying the locomotive may have slowed down too quickly. If the cars ran in, there is a possibility they should have had air in the cars on that movement, and that is the ground crew, that is the whole train, not just the limitation of the locomotive. If they had air in the cars --

THE COURT: There is nothing in your lawsuit about the causative effect of no air in the cars. I know Mr. Eggert mentioned it.

MR. COLLINS, SR.: He mentioned it, but that is argumentative as to whether that caused it or not.

THE COURT: Doesn't it have to be in your pleadings?

MR. COLLINS, SR.: We will amend to put it in.

THE COURT: It does have to be in the pleadings?

MR. COLLINS, SR.: We will make a motion to amend.

THE COURT: It does have to be in your pleadings, you admit?

MR. COLLINS, SR.: I don't admit that.

THE COURT: You mean you don't have to amend your pleadings?

MR. COLLINS, SR.: I said we would make a motion to amend.

THE COURT: You have to amend your pleadings, it has to be in your pleadings before it goes to the jury. Getting back to the other question about the claimed negligent operation of the locomotive, do you agree also that that would have to be your pleadings through an amendment or otherwise?

MR. COLLINS, SR.: I state that is already in there. Section 5 of the interrogatories. We are arguing that a yard switcher -- we are not finished with our case yet -- that a yard switcher would have been more significant to use than the road switcher because of the brakes in the application of the brakes on the yard engine, it could control it more.

MR. COLLINS, JR.: That is in the case, whether they should have used a road switcher or yard switcher under the circumstances. We are claiming that --

THE COURT: All I am talking about -- even that leaves out any question of any negligence on the part of Mr. Kendall.

MR. COLLINS, SR.: We don't know, maybe Kendall couldn't do

anything with the road engine.

THE COURT: If he couldn't, he is not negligent, is he?

MR. COLLINS, SR.: The railroad is for giving him the wrong engine.

THE COURT: Is it part of your case that there is claimed negligence on the part of Mr. Kendall in the operation of the locomotive?

MR. COLLINS, SR.: We don't claim it on Kendall, we claim it on the railroad.

THE COURT: I will grant the motion to strike then.

MR. COLLINS, SR.: We claim it on the part of the railroad, we are not suggesting Mr. Kendall --

THE COURT: I understand that.

MR. COLLINS, JR.: Your Honor, could you state for the record what you are striking?

THE COURT: I am striking the testimony of Mr. Eggert that there was negligent operation in the too abrupt deceleration of the locomotive by Mr. Kendall.

MR. COLLINS, JR.: Can we have a five minute recess?

THE COURT: You are going to talk to Mr. Kendall?

MR. COLLINS, JR.: I want to talk to Mr. Eggert.

MR. COLLINS, SR.: Your Honor, could we recess and have Mr. Noel read back your interrogation of the witness as far as what happened? I think

that we should at least have something other than our memories as to what the testimony was before we can properly decide.

THE COURT: I am sure Mr. Noel can find it.

(Thereupon the reporter read as follows:

"THE COURT: Let me ask you this about the same thing. You said there was no excessive speed, you had said that Mr. Kendall had throttled down, which I understand means decelerated?

THE WITNESS: Yes.

THE COURT: Was there any excess deceleration, did he decelerate too quickly for normal activity?

THE WITNESS: He decelerated fast, yes.

THE COURT: Are you making any claim in that regard?

MR. GRIFFIN: Your Honor, I've got enough to ask without -- excuse me. There is no claim in the case here that there was a deceleration. Now, I don't want to have to go on another --

THE COURT: I am interested in it and I think the jury is interested in it because of the slack operation. Isn't it true, Mr. Eggert, that you get this slack running when you are stopping the engine?

THE WITNESS: Yes.

"THE COURT: If you stop more quickly than normal you will get an excess of slack running in?

THE WITNESS: Yes, it would be severe.

THE COURT: I am trying to find out whether that is any part of your claim?

THE WITNESS: Well, he decelerated pretty fast when someone went out of sight -- he is supposed to stop when there is no one in sight.

THE COURT: Not what he is supposed to so, what did he do?

THE WITNESS: He decelerated fairly fast.

BY MR. GRIFFIN:

Q. Are you now contending that the man was operating the engine improperly decelerated the engine?

A. I would say he decelerated too fast, there would be other ways of slowing down.

Q. For how long a time had he been decelerating in an improper way?

A. Not long.

THE COURT: You said he throttled down, is that all he did?

THE WITNESS: He throttled down.

THE COURT: Did he apply the brakes?

THE WITNESS: He must have applied the brakes.

THE COURT: Not must have.

"THE WITNESS: Yes, he had to apply the brakes, the train stopped.

THE COURT: Is that before he throttled down? Now you are saying he throttled down and applied the brakes?

THE WITNESS: Yes, sir.

BY MR. GRIFFIN:

Q. The train hadn't stopped, it wasn't stopped at the time of your accident?

A. No, it wasn't.

Q. It was going a few miles an hour?

A. That is right.

Q. Didn't you testify that the slack action that night was a perfectly normal slack action?

A. If I testified to that, I'm sorry. That is wrong, it was quite severe.

Q. Well, let's see what you said about slack a year ago. May I just have a minute, your Honor.

THE COURT: I seem to have introduced some new factors."

MR. COLLINS, JR.: Your Honor, at this time we will make a motion to amend our answers to the interrogatories to include the testimony as brought out on trial that Mr. Eggert did claim there was a question of an improper deceleration

of the engine. We are claiming that as part of the case. Mr. Eggert says in his opinion he felt that was perhaps negligence on Mr. Kendall, and now it presents a question of fact for the jury. If the railroad intends to show that indeed there was not an improper decaleration, the burden of proof falls on the railroad.

THE COURT: This at least sharpens up your position, and whether or not it is any reversal of where I thought you ended before, so be it. In any event, you are now saying that it is part of plaintiff's claim that there was negligent or improper operation of the locomotive causing an excess run-in?

MR. COLLINS, JR.: That is what the plaintiff stated on the stand, that is part of our claim. We will make a motion to amend our pleadings to conform to the evidence as presented in court. I think the same point was brought out in the prior trial, and the Court said that is a question of fact for the jury, a question of credibility for the jury. We move to amend our pleadings to indicate that there may have been an improper allocation

of air in the cars being switched out, there may have been an improper makeup of the cars being switched out in terms of the size of the cars, and so on.

THE COURT: May have been or was?

MR. COLLINS, JR.: There was, your Honor, an improper allocation of air used in the switching movement, which would be attributable to the ground crew involved in this case. It is our position, your Honor, when the plaintiff testified that we have come forth with the evidence, and if the jury believes that they can rule in our favor, and the burden shifts to the railroad to disprove the plaintiff's version of the facts. Your Honor, under the circumstances we have no objection to granting Mr. Griffin a continuance for a day or two if it is his claim that he is surprised by this new element in the case, in order for him to properly prepare to defend the information or the allegations that have come out on the stand. As the Court is aware, we were not in this case when it first began.

THE COURT: You have been in for quite a while, Mr.

Collins.

MR. COLLINS, JR.: Your Honor, I must be candid with the Court. The fact that the Court let the slack action in the last time and overruled Mr. Griffin's objections and said it was a question of credibility and a question of fact for the jury led me to believe the same situation was going to be in this case and --

THE COURT: I haven't kept the slack run-in out of the case at all. We had the added factor thrown in about the negligent operation of the locomotive, and that is a factor, and now the lack of air in the cars is another factor.

MR. COLLINS, JR.: I was under --

THE COURT: I will grant those amendments. Now I have to see --

MR. GRIFFIN: Your Honor, may I be heard?

THE COURT: If you want to take off from there in some position. You may need some time to consult your principals.

MR. GRIFFIN: Your Honor, the second motion deals with some contention relative to whether there should have been air in each of the cars. Now, the plaintiff has concluded their direct

case. This case has been going on for --

THE COURT: What do you mean?

MR. GRIFFIN: As far as the plaintiff's testimony is concerned they have concluded.

THE COURT: The direct examination of him, yes.

MR. GRIFFIN: Now, the only question relative to air was, was the air on, were the brakes on, were the brake shoes applied, was the locomotive whistle blown, was the bell rung, was this, was that. That proves nothing other than they were not there. It doesn't prove it was normal, normal to have the air on in a switching movement? Of course, it isn't when they are making up trains of this nature, coupling and uncoupling, but that is beside the point. They come in and they make no allegations relative to improper makeup of the train or coupling or cars or putting air in the cars, that has never been in the case. They didn't offer that in any respect on the testimony of the plaintiff. They didn't refer to it in their opening statement in any regard, and it is not in this case. I don't know anything about air or not air, and how can that

possibly be in this case? Can you come in and make up theory after theory and hope maybe you are throwing enough to the jury that something may stick? This is an impossible situation for me. Relative to the first part, to change the motion, to amend the pleadings to claim that there was negligence on the part of the engineer, that he improperly decelerated the train and therefore caused an unusual, excessive, extraordinary, improper and severe slack movement is totally unjustified in this case. On the first trial the man stated that he was up and slack threw him. Of course, I objected then because that had never been introduced as any part or feature of the case. It was never contended that the slack was negligence. The affirmative testimony was that the slack was normal. The admission was the slack was normal and to be expected, and all that the plaintiff sought to establish was that that was one of the operative factors that existed on the night of the accident, and what he attempted to say was that the seat, because he wouldn't

have had to get up, or that the exposed brake valve in some way caused his injury. But just like there was a floor, just like he was working, just like it was moving, just like there is a fireman and engineer, just like there is two sides of a cab, it was at night, the slack, it is all part of the operative facts that he attempted to show. Now, we felt those were not the operative facts, but it goes to the credibility. This isn't an issue of negligence. Now to come in today -- what did this man say in his testimony? He said that he had always told his lawyers about slack -- I questioned him, but that was his testimony -- he said, 'I always -- I didn't tell the railroad anything about the slack -- but I always told my lawyers from the beginning.' That is his sworn testimony. Now, they have expressly and unquivically stated that a contention of negligence relative to the movement of the train by reason of the slack or whatever brought the slack about is not in this case.

THE COURT: That had been their position.

MR. GRIFFIN: It has always been their position.

THE COURT: Unitl he testified yesterday.

MR. GRIFFIN: They didn't introduce that, and unles you vacate that express admission and that express stipulation relative to what the theories are in this case or you justify in some way why you didn't plead it before or make this contention, unless you do that, how can you willy-nilly come in and make such an amendment?

THE COURT: Where is the stipulation? You mantioned that admission that Mr. Semple made or the statement that he made in argument at the end of the last trial?

MR. GRIFFIN: Your Honor, if a lawyer stands up in court and says, 'We make no contention -- after the evidence is in -- we make no contention that this part of the railroad operation, namely, slack is in any way negligence.' That is a binding situation on them. They can't later turn around in the very same case and say, 'We now want to say differently, we now are going to contend that the slack is a negligent part of the operation.' You can't, that is binding on them, just like if they say -- you don't have to use the

word "stipulation" -- that is --

THE COURT: It is quite critical.

MR. GRIFFIN: Just as if you interrogated Mr. Collins and said, 'Is it any part of your theory in this case such and such,' and they said no, and then you come back -- another lawyer walks in and says, 'I am now going to try the case on that theory that Collins said wasn't in the case.' You can't do that unless you vacate that, unless you show there was some information that wasn't available, unless you show that you were mistaken, unless you show that there was some fraud or mutual or unilateral mistake of fact. That isn't in the case. The case is here, his lawyers always knew of that situation relative to the claimed involvement with the slack.

MR. COLLINS, JR.: Your Honor, Mr. Griffin argued the same point to the Second Circuit. They obviously rejected it. Mr. Semple isn't binding us just because he said slack action is normal, that is not what Mr. Eggert is saying on the stand.

THE COURT: If he had stipulated it would, of course,

be binding upon Mr. Eggert regardless if Mr. Semple continued to be the attorney. Well, there is no need of going into that, but I view it, Mr. Griffin, as being a position that was taken by Mr. Eggert at the conclusion of his evidence in the first case, and if this where we now are had been reached midway or part way along in the presentation of the direct evidence in the first case, I would be again presented with the amendability of the claims to conform with the proof or otherwise for that trial. Now, there could have been an amendment at the time we were arguing before, Mr. Semple and you, there could have been an amendment to conform the pleadings to the proof at that time. At that time, of course, there was no proof in the case of any -- nothing in the earlier case about any negligent operation of the locomotive, and I don't recall any testimony in the first case about any lack of air in the cars, particularly of any result or effect of the lack of air in the cars. So neither of those could have come in by way of amendment

in the first case. Now, however, while they are in the middle of presenting their case, and admittedly they have completed the direct examination of Mr. Eggert, but they have in no manner or means completed their direct case. I don't know whether they have other witnesses, I assume they would have other witnesses that would be part of their direct case. So we are midway in their presentation. Now, I see nothing wrong in exercising my discretion in the direction of allowing this amendment of their pleadings. Now, granted, as I told you in chambers yesterday when we were talking about part of this same problem, and you at that time had been talking about a possible motion for a mistrial. I indicated that I would be most receptive to any application you wanted to make for any continuance or any other relief you wanted. Of course, that still goes, and whether you move for a mistrial is up to you. But I am saying right now that I am granting the motion to amend the pleadings so that these two claims are in the action.

MR. GRIFFIN: May I say just one other thing? Let's assume that at the close of the plaintiff's case -- at any time -- let's assume when it first occurred last October 1975 --

THE COURT: After the plaintiff's case had closed?

MR. GRIFFIN: Let's say after all the evidence is in. I stand up to make motions and the Court says to me, 'Mr. Griffin, do you say there is any contributory negligence in this case in any respect,' and I say, 'No, your Honor, there is no claim of contributory negligence,' or I ahswer, 'Yes, we contend there is contributory negligence,' and you say to me, 'On what basis, on what theory do you claim that this jury could find the plaintiff was contributorily negligent,' and I say, 'They could find that he was contributorily negligent in that he failed to be conscious of where the emergency brake valve was when he turned in his seat and struck it.' Then you said to me, 'Well, do you claim the way he was getting out of the seat that he was careless in any respect in that way,' and I say, 'No, we make no contention he was contributorily negligent the way he chose to

get out of the seat.' Now, although I don't say expressly, "stipulate," each of those are binding statements on behalf of the client. Now, I couldn't, absent an application to the Court to vacate what I expressly agreed to last year in the case, I couldn't come in on a second trial and say, 'Yes, I now claim that he was contributorily negligent,' when a year ago --

THE COURT: Why can't you? The second trial makes a different ballgame, a new ballgame.

MR. GRIFFIN: No, it doesn't, your Honor.

THE COURT: Absent a stipulation.

MR. GRIFFIN: Pardon?

THE COURT: Absent a stipulation.

MR. GRIFFIN: It is in the case, it is an express agreement in the case. Suppose you have any number of matters that may be in the case. Suppose there are three theories --

THE COURT: Why don't we sit down and read this to the jury instead of putting Mr. Eggert on the stand?

MR. GRIFFIN: Suppose --

THE COURT: By "this," I held up Defendant's Exhibit 2.

MR. GRIFFIN: Suppose you have three theories of liability.

Suppose you have breach of warranty in the case, suppose you have strict liability and negligence, and in the prior trial the Court says to the plaintiff, 'Do you have any evidence of negligence,' and the plaintiff says, 'No, no negligence, we just say that the product was defective, I didn't know it was defective, therefore they are strictly liable.' The Court says, 'I don't think absent any notice that there can be strict liability, I dismiss the complaint.' And you go up on appeal and the Appellete Court says, 'No, we think there is a question of fact under the law as to whether there is strict liability.' You come in on the second trial and you say, 'I also claim negligence on the second trial.' Well, you expressly agreed there was no negligence in this case before, can you now, absent vacating that express agreement and express understanding and statement, come in and prove negligence? No, you can't. I say that is what occurred in this case.

THE COURT: You say flatly no, you can't?

MR. GRIFFIN: Well, unless I apply to the Court and I

remove that express stipulation and express statement.

THE COURT: Isn't that what they have done?

MR. GRIFFIN: No.

MR. COLLINS, JR.: Your Honor --

MR. GRIFFIN : They haven't removed that, that admission stands.

THE COURT: It is a necessary tie in with the motion to amend.

MR. GRIFFIN: Your Honor, it is just -- how can you try a lawsuit when you have this theory, that theory, and that theory express, and they say, 'This isn't in the case, this isn't in the case,' and all of a sudden you come along and you create new theories that were never advanced in the case. How can I defend a case of that nature?

MR. COLLINS, SR.: Those are merely theories, facts are what we are interested in here, and the facts haven't changed. There was a decrease, and the slack ran in --

THE COURT: Those are not really theories, Mr. Collins, because we frame issues by pleadings and by interrogatories and answers, and those are the theories that you try it on, and

then the facts have to be pieced out. The theories are important, claimed theories are important.

MR. COLLINS, JR.: If I understand Mr. Griffin's argument though, I think if you take it one step further he will tell the Court we can't argue there is a violation of the Boiler Inspection Act because Mr. Semple didn't argue it the last time. The facts of the case and the law are there. Mr. Semple missed the Boiler Inspection violation, he didn't argue it on the case. Are we bound by an alleged stipulation that Mr. Semple made, that we can't try the Boiler Inspection case?

THE COURT: I made my ruling on the motion to amend, and now --

MR. GRIFFIN: I have a further application for the Court. Your Honor is permitting those amendments?

THE COURT: Yes.

MR. GRIFFIN: I respectfully except. I have a further application to make, your Honor. I move to continue this case until Tuesday morning. I move for leave to further depose the plaintiff in this case forthwith at 1 P.M.

today in light of this new application. I need that further deposition because at no previous time did I ever have an opportunity by deposition to depose the plaintiff on these theories that he is now advancing. I further need time to determine what, if any, proof I need to meet this by Tuesday, and I believe Monday is a holiday?

THE COURT: Monday is a holiday.

MR. GRIFFIN: Frankly, I need all of that time.

MR. COLLINS, SR.: We have no objection to the continuance. As the rule states, you should be liberal in granting it. I would like to have Mr. Eggert deposed tomorrow morning, rather than this afternoon, if possible.

THE COURT: Why?

MR. COLLINS, SR.: Because of the press of business and --

THE COURT: You were going to be here in court this morning.

MR. COLLINS, SR.: I realize that. At that time we may request to depose witnesses after we have had time to think it over.

THE COURT: You may. Now, I will grant the continuance, however, into Wednesday morning instead of Tuesday morning. That would be to nine

o'clock on the 13th, is it?

THE CLERK: Yes, your Honor.

THE COURT: Wednesday the 13th. I have to draw two juries on Tuesday morning, and I have my normal Monday calendar on Tuesday afternoon. I will grant the application to depose Mr. Eggert this afternoon at one o'clock. Where would you have that?

MR. GRIFFIN: In our office.

THE COURT: Where is that?

MR. GRIFFIN: 2300 Erie County Savings Bank Building.

THE COURT: One o'clock today for the deposition of Mr. Eggert, and if there are any depositions that you want to take, you can. If you find that Mr. Griffin will not accommodate you on some less than normal notice, why then you will have to come back and see me, and we will see what is involved.

MR. COLLINS, JR.: Your Honor, we have one practical problem. Looking at the pretrial filed by the other attorney, obviously I wasn't on trial for four days, I got a memorandum, and we may present a union expert on the question of the inspection sheets and what the railroad does with them. We may call the ground

crew. They are not listed, and I would ask the Court for a direction. Mr. Griffin knows who the people are, we may want to put them on the stand, and I could have that done by one o'clock this afternoon so as to apprise Mr. Griffin of who we may call as an expert witness.

THE COURT: All right. Is it your position that Mr. Eggert doesn't know the identities of the ground crew?

MR. COLLINS, SR.: We know them now, I have a list of them.

THE COURT: You know them?

MR. COLLINS, SR.: Yes, Mr. Brand was the conductor.

MR. COLLINS, JR.: Your Honor, one time Mr. Griffin made a motion to not let us bring somebody on as a direct witness because he listed him as a rebuttal witness, and the court granted it. I want a direction from the Court. We may put on an expert from the union as to those work records, and we may put on the three brakemen. I would present the pretrial statement to Mr. Griffin at one o'clock, nameing the witnesses in case he wants to question them. They all work for him -- for the railroad.

THE COURT: Any amended situation on your order of proof will be handed to Mr. Griffin by one o'clock this afternoon.

MR. GRIFFIN: If the Court please, I strongly oppose any new witnesses for them, any additional theories or depositions or discovery on their part, and if there is going to be anything like this permitted, then I withdraw my application for a continuance, I want to go forward right away. The sole purpose is because this is foisted by the plaintiff upon the defendant in this case. This isn't an opportunity to embark upon all sorts of new witnesses, new theories and everything of that nature. Otherwise I would have asked for a mistrial. I don't want to incur the burden of coming back here and trying a whole new lawsuit, that is totally unfair. We prepared one lawsuit, one theory, and they are not going to have an opportunity to, as far as I am concerned. So if the Court is inclined to grant any other application, I would withdraw my application for a continuance and the deposition, and I will go forward in this

case. I think I am forced to defend a case that I shouldn't have to defend, but there is no application to buttress their theories here by additional discovery or anything of that nature. They have had years to discover, they have known what the contentions are.

MR. COLLINS, SR.: We apologize to the Court for the nature of these pleadings. The Court is aware that they are not our pleadings and that --

THE COURT: That doesn't matter because they are Mr. Eggert's pleadings.

MR. COLLINS, JR.: The Court is aware of the thoroughness that our office does on this type of case, what we put in the pretrial, what we put in the trial memorandum, what we put in the interrogatories. We didn't get into the case until the appeal, that is the first time we have had because of the press of our office to sit down and get these --

THE COURT: You give me a copy of the amended list of witnesses by one o'clock, and I will take into consideration your request to withdraw your motion for the continuance, and you can proceed with the deposition of Mr.

Eggert at one o'clock, and during this afternoon I will give you further word as to whether I will, one, allow further witnesses in and, two, if we do, what I will do on your request to withdraw the motion for continuance.

MR. COLLINS, SR. Your Honor, is Mr. Griffin going to be limited this afternoon? We would like to know the limitations as far as --

THE COURT: Anything pertinent to the lawsuit.

MR. COLLINS, SR.: Things that he has already gone over and are repetitious? I don't see that that is --

THE COURT: The only thing is, if you are going to get into nipping and snarling about little points and little questions, whether it has been gone over or not, you are going to have to be running back to me all afternoon. I will be here if you want me, but I assume Mr. Griffin is not going into stuff that he already has discovery on, but if there be some small degree of overlap, so be it. If it becomes abusive or harrassing, then, of course, you have a different problem. But I will be here, and if there is any problem, the two of you get me on a conference

call or come over and see me. The easier way is to get on two extension phones and get me on the phone, and we will make a ruling.

MR. COLLINS, SR.: Your Honor, I was including medical, and things like that. I didn't think that was pertinent to his request.

MR. GRIFFIN: I can't imagine that I will pursue any medical.

THE COURT: I am assuming that --

MR. GRIFFIN: The medical is all closed, as far as I am concerned.

THE COURT: I am assuming that the matter will go ahead with propriety and good faith. It is important then that I and Mr. Griffin get your amended pretrial memorandum, and at that point meanwhile you will go ahead with Mr. Eggert and his deposition, and I will consider what you are setting forth, and I will consider Mr. Griffin's position. If your position changes after you see that amended pretrial statement, Mr. Griffin, you can let me know, as far as asking for a withdrawl of your motion for continuance. All right, get the jury up. I will tell

the jury there will be nothing today, and we will have them called in this evening.

MR. COLLINS, JR.: Thank you, your Honor.

(Thereupon the jury entered the courtroom at 10:35 A.M.)

THE COURT: You don't have to take your seats, ladies and gentlemen, just come into the courtroom, file across the back of the courtroom. We have been delayed until this time. We have various legal problems and procedural problems to be considering, and we have reached a point where we do face one rather severe procedural problem, which is going to necessitate our not going ahead with further evidence today. Now, we think it possible that we may be going ahead tomorrow or it may go off to a day early next week. I will know that by the end of today. Now, I am going to let you go today, and we have this number, the clerk is going to give you a telephone number, which each of you should call after five thirty. There will be a recorded message on that telling you

whether or not you should come in tomorrow morning, and perhaps some further instructions, either a new date or to call in on a different date. You may go at this time, as far as today is concerned.

(Thereupon the court was in recess at 10:37 A.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 2:10 P.M.

(Jury absent.)

THE COURT: Now, I have from plaintiff's attorney an amended pretrial statement wherein they have indicated the possibility of calling five or more additional witnesses, and I have some one sided advice from Mr. Collins indicating that there had been a deposition, a further deposition of the plaintiff, but it was not a lengthy one. Suppose one or the other of you tell me what happened there.

MR. GRIFFIN: If it please the Court, the plaintiff with counsel did appear at my office at one o'clock and at that time there was tendered to me the statement that your Honor referred to. I had in mind only asking a few questions of Mr. Eggert, which I commenced to do, and it is apparent to me that no useful purpose is served by asking this witness any further questions. I handed back to Mr. Collins the tendered pretrial statement on the grounds that I don't think I should get into

another lawsuit, this is a completely improper thing to embark upon at this time. I would like to conclude this case as soon as possible on the issues that have been presented here and are properly before the Court, and I withdraw my application for any further continuance, and I ask that we resume and hopeful conclude the evidence tomorrow morning, and I would object to any further witnesses, other than those who have already been indicated. They have stated they were going to call Mr. Kendall and possibly a rebuttal witness and I am ready to handle that. Anything else I think is totally improper, and this new pretrial statement with all these witnesses and various theories that have never been in the case, I strongly object to that. I am anxious to have the credibility of this witness determined by this jury. I don't think we should be put to further expense or delay or new theories that have never been in this case.

MR. COLLINS, SR.: Your Honor, these witnesses that we intend to produce are not new, in the respect that

they are introducing anything new into the case. They are answering questions that Mr. Griffin has raised on his cross examination. I don't know whether Mr. Griffin is going to use any witnesses or not, but it would be rebuttal to his cross examination. Mr. Griffin's pretrial statement says that he will merely call William J. Kendall, Dr. Sanuel Militello, Dr. Eugene Hanavan, inspectors -- we don't know who they would be -- of equipment from railroad and railroad persons experienced in the nature and location of equipment and locality, fellow crew members.

MR. GRIFFIN: All I intend to call, frankly, is Dr. Militello, and I intend to possibly put Mr. Reich on solely to say that that was his singature, he made out that report, and that is what the man said, so that the accident report can go in evidence, and that is it, that is all I intend to produce. My cross examination of the plaintiff is just about concluded. I have maybe four or five other questions. I would not go into anything that wasn't gone into on direct examination.

It would just be a wrapup of certain parts, the location of the seats, his activity in the cab.

THE COURT: Looking at the pretrial statement for plaintiff, which was actually one filed June 4, 1975, this was by Attorney Lankes. Was there an intermediate one filed by your office?

MR. COLLINS, SR.: There wasn't.

THE COURT: What is this about a possible rebuttal witness? I don't see anything in the June 1975 pretrial statement. It says "witnesses Thomas Eggert, William Kendall, Dr. Joseph Godfrey and/or Dr. Daniel Curtin." Was there any so-called rebuttal witness?

MR. COLLINS, SR.: Your Honor, Mr. Griffin has brought in reports, inspection reports, and so forth, as far as this engine. We have one employee by the name of Parker that we would like to call on rebuttal, who was injured in the very same engine on the fireman's side in the seat in March of 1971. Now, we want to bring that in to show the report that he made and the condition of the seats, and so forth, as rebuttal to Mr. Griffin's

bringing in these reports. I subpoenaed every report for the year 1971 as to this particular engine, your Honor, and Mr. Griffin has supplied them, and I have them in my files, other than the two that he has admitted, and they have nothing to report. I specified in there Mr. Parker's injury in the very same engine, and there is nothing in it, it hasn't been brought in. I asked Mr. Griffin if he had this, and he said, "Since Conrail we have lost the file, we had to go to Cleveland," and he doesn't answer my subpoenas, and I think we have a right to bring Parker in to testify as to his previous injury on the same engine, same locomotive, and on the condition of the seats on that engine.

MR. GRIFFIN: Your Honor, they are now suggesting that they want to bring in an employee who was supposedly hurt on the same locomotive in a totally different circumstance a number of months before. That has nothing to do with this, and I don't know how that can be probative of anything that occurred on the night of the accident.

MR. COLLINS, JR.: I subpoenaed those records. It is the care and maintenance of the engine. The very seat was broken at the time, the very seat was out of that engine.

MR. COLLINS, SR.: He will testify that they had to work with that engine for one week. The railroad was going to fix it, they were going to fix it, and they kept reporting it and the railroad never fixed it. The railroad is trying on cross examination to insinuate to the jury that if you make a report, they run out and fix it. We think we are entitled to --

THE COURT: You say you subpoenaed certain records, you have had notice of this earlier injury due to the same seat, I take it?

MR. COLLINS, SR.: Yes, your Honor.

MR. COLLINS, JR.: When we got ready to go to trial.

THE COURT: Why is he not listed as a witness initially?

MR. COLLINS, JR.: I don't know if Mr. Lankes had any notice of it when he filed his pretrial statement in 1975. We were not part of that case.

THE COURT: I know, but you have been in for more than a year.

MR. COLLINS, JR.: Your Honor --

MR. COLLINS, SR.: Actually we were not in it until after

June 25, 1975.

MR. COLLINS, JR.: Your Honor, I was on trial or I would have filed a pretrial statement before you last Thursday, before we started this case, because that is when we usually file them, and indicate who we were going to call in this case. I was on trial, and with pretrial statements and requests to charge in another case, I didn't have time to do it. The other -- with the other runnings of the office, and so forth, my father didn't have time to do it.

MR. COLLINS, SR.: We discovered Parker during our interviews with Mr. Eggert prior to trial. We discovered that he had an FELA case on the very same engine in March of 1971, March the 11th.

MR. COLLINS, JR.: The same chair.

MR. COLLINS, SR.: The same chair, the same engine. I subpoenaed the records on those, and Mr. Griffin says, 'We know nothing about it,' at least he didn't bring them in. Every time I served the railroad with a subpoena to bring something in, their defense is, 'We have lost them, we can't find them.'

THE COURT: Do you have that subpoena?

MR. COLLINS, SR.: I have it, your Honor. Here is one we served on the Norfolk & Western, it was their engine. We also served the Erie Lackawanna. This is the Erie Lackawanna one, your Honor, and the other is the Norfolk & Western. They are both defendants.

THE COURT: What is your position, Mr. Griffin, on that aspect of this subpoena duces tecum? "All accident and repair reports wherein employee Harold Parker was injured while an employee of Erie Lackawanna Railway while working on N&W Locomotive 2500 prior to June 21, 1971."

MR. GRIFFIN: Your Honor, as you know, I am merely a conduit for any records. Now, if Mr. Collins feels that there hasn't been a particular record produced relative to the subpoena, and he can point it out to me, I can go back and ask them if there is -- if they haven't given me everything they have. That is all I can do. Your Honor, I turned over a batch -- I checked and Parker was hurt back in March of 1961 -- March of '71, when apparently there was a collision of two trains, and as far as I could tell, I didn't see anything particularly involved

about a seat, but there was a -- among the records that were turned over to me there were some work reports, inspection reports, from March of 1971 that dealt with the front seat of this particular locomotive. Now, when I was casually going through the work reports I noticed that, and if there is something additional that we haven't produced, and we have it, I will be glad to ask for whatever it is.

THE COURT: What has been produced pursuant to this demand?

MR. COLLINS, JR.: Your Honor, the date of the accident was March 11, 1971, and Mr. Parker was injured on this seat, also because the seat didn't have any padding on it, there was just the two metal frames sitting in the engine. Mr. Parker indicated to me that they complained about that seat for one week, and the railroad made them work with the same engine not being repaired. That is part of the claim, that the railroad didn't repair this engine, and has a habit of not repairing engines.

MR. GRIFFIN: I have here, your Honor, a copy of Parker's

accident report and a copy of the statement that Parker gave to the Claim Department. I will be glad to give that to counsel.

MR. COLLINS, SR.: He doesn't answer my subpoenas. I asked him for it.

MR. GRIFFIN: You haven't asked me for that.

THE COURT: You asked him to produce it and he has produced it. You haven't asked him for the document in court.

MR. COLLINS, SR.: I said I wanted all the reports on that engine, accident reports on that engine, and so forth, and he gave me these. Those two mentioned the seat is missing on the 7th and 9th of March of 1971.

MR. GRIFFIN: You don't want a copy of Parker's accident report?

MR. COLLINS, SR.: I want to bring Parker in and have him testify as to filling out these forms. Mr. Griffin insinuates they are available, they should be filled out.

THE COURT: Mark these in that order, Plaintiff's Exhibit 33, 34, 35 and 36.

(Thereupon documents referred to were marked Plaintiff's Exhibits 33 through 36 for

identification.)

MR. COLLINS, JR.: Your Honor, Mr. Parker indicated also that these inspection reports they are talking about, the railroad is talking about, were not available in the terminal and hadn't been available for a prolonged period of time.

THE COURT: Somehow the engineer who worked the shift before Mr. Eggert worked the shift, and after Mr. Eggert had work reports or inspection reports.

MR. COLLINS, JR.: Well, it depends where the engine is, your Honor.

CLERK: What are these?

MR. COLLINS, SR.: Those are Parker's supposed accident reports.

THE COURT: What I have marked for identification as Plaintiff's Exhibit 33 is a March 7, 1971 inspection report relative to Engine N&W 2500, and as Plaintiff's Exhibit 34, an inspection report on 2500 dated March 9, 1971 and as Plaintiff's Exhibit 35, October 1, 1976 subpoena duces tecum on behalf of plaintiff to the Erie Lackawanna Railway Company, and as Plaintiff's Exhibit

36, a subpoena duces tecum on that same date, and on behalf of the plaintiff, to the Norfolk & Western Railway Company. Have you handed over the accident reports?

CLERK: There are three separate sheets, your Honor.

THE COURT: Let me see what they are? Mark these three sheets as Plaintiff's Exhibit 37.

(Thereupon documents referred to were marked Plaintiff's Exhibit 37 for identification.)

THE COURT: I have marked as Plaintiff's Exhibit 37 for identification three sheets, which I have stapled together. The first is on Form OD-4, entitled Erie Lackawanna Railway Company Telegraphic Report of Accident. The second sheet is Form GU-4017, entitled Erie Lackawanna Railway Company Report of Personal Injury, and the third sheet is GU-4017-A entitled Erie Lackawanna Railway Company Supplemental Report of Personal Injury, and the contents of all three sheets apparently deal with an incident that occurred about 5:40 A.M. on March 11, 1971 wherein H.E. Parker, Jr., who was then occupied and

employed as an engineer, suffered injuries apparently to his neck and perhaps his back when, according to the statement of one J.G. Smith, the assistant terminal trainmaster, Engine Number 2500 while shoving twelve cars on a track hit cars which were already on that track. The indication is Mr. Parker was not running the engine at that time, that the fireman, R.M. Knoop was operating the engine. There is in none of those three sheets any reference to any seat on 2500, nor any reference to any defect in it. Now, in Plaintiff's Exhibit 33, which is the March 7, 1971 inspection report, this second item listed is "left front seat missing," and Plaintiff's Exhibit 34 for identification, which is the March 9, 1971 inspection report, the first entry there is "replace front seat -- L.S." I find nothing in Plaintiff's Exhibits 33, 34 and 37 which would in any way be any notice to the defendants of any allegation of a defect in the front seat, such as was encountered here, even as of the date as far away from our event as March of 1971.

Consequently, my ruling is that Mr. Parker may not be called.

MR. COLLINS, SR.: Let me say before you finish your ruling, your Honor, that is a question of fact for the jury, it isn't something you should find as a matter of law.

THE COURT: I am finding as a matter of law that it is not part of the case.

MR. COLLINS, SR.: Let me state that in the answers to defendant's interrogatories, Answer 13 is directed to the Norfolk & Western Railroad, and it says, "The defendant Norfolk & Western Railway Company did not provide the proper type of yard switching locomotive for the job which the plaintiff and his crew were ordered to do. The locomotive the plaintiff was operating was a road locomotive, not properly suited for yard switching work." And that continues, "The defendant Norfolk & Western Railway Company failed to provide the plaintiff safe equipment and did order the plaintiff to work with an unsafe engine, knowing said engine was unsafe. The defendant failed to properly inspect the said engine, and failed to dispatch any mechanics,

car repairmen or other employees to repair or rectify the conditions." We allege, your Honor, that Mr. Parker can testify that for a period of at least a week that this engine was operated in a defective condition without the front seat, and we need his testimony to show that the railroad failed to heed any of these notices, if they were given to them, and the testimony of Mr. Eggert was that it became useless to fill them out, the railroad refused to do anything.

MR. COLLINS, JR.: Secondly, your Honor, that the mere -- the basic fact that the railroad reports the accident and doesn't even mention the seat is part of our claim. Mr. Parker is going to testify that the seat was defective the day he was hurt, there was no seat on it, it was a piece of metal.

THE COURT: You said in your earlier statement that he would state that there was no padding on the seat at that time.

MR. COLLINS, JR.: Your Honor, there was nothing, just two pieces of metal that he fell on, and the report doesn't even mention the defective

seat. That is our point here, the railroad never mentions the defective seat, never fixes them. They are trying to cloud the issue. We want the facts before the Court, that is all we are asking.

THE COURT: The facts that we have show quite decisively that the condition that Parker would testify obtained on March 11, 1971 did not obtain on June 22, 1971.

MR. COLLINS, JR.: He would testify that the roadroad didn't do anything, that the seat was defective, that is what Mr. Eggert is saying, there was a defective seat.

THE COURT: The testimony very clearly is that the seat had padding on it.

MR. COLLINS, JR.: He said it was defective. Mr. Parker will testify that the seat was defective and the railroad didn't do anything for a week. Mr. Eggert is testifying the seat was defective and the railroad didn't do anything. He pleaded it in his interrogatories. The jury can draw a conclusion from the past practices of the railroad, whether or not they fixed these defective conditions.

THE COURT: You have subpoenaed the inspection or work

reports relative to this engine for a time prior to June 22nd, isn't that part of your subpoena?

MR. COLLINS, SR.: Yes, your Honor.

THE COURT: Mr. Griffin, has there been a search for inspection reports relating to this engine for a reasonable time prior to June 22, 1971?

MR. GRIFFIN: Yes. They had the subpoena, I told them that the subpoena covers from the beginning of 1971, from January, and I have given them what they have given me.

THE COURT: What have you given them? Is there an inspection report that applies to Engine 2500 prior to June 22nd, other than Defendant's Exhibits --

MR. GRIFFIN: Twenty or twenty five of them, your Honor.

THE COURT: -- either Defendant's Exhibit 3 or 4, which were the ones we put in? One related to June 21st in the morning, and the other relating to I think approximately three o'clock on the afternoon of June 22nd. Now, were other reports as to 2500 handed to you?

MR. COLLINS, SR.: Twenty five for the year 1971, twenty five

reports out of a year of three hundred and sixty five days have been submitted as to piecemeal inspections, no reports as to work done on the engine following this accident. following any accident --

THE COURT: Is it your claim that Mr. Griffin hasn't fully complied or responded to your requests for all the inspection reports?

MR. COLLINS,SR.: I can't say that he hasn't complied. I say the railroad runs a slipshod railroad if they didn't keep those records. They should have them available, and we should know how many days that engine was in use in the year 1971 and where it was in use.

THE COURT: Why?

MR. COLLINS, SR.: So we can see where the repairs should have been. They can show through that where they repaired the engine.

THE COURT: We have to find some report of this particular defect. I assume among the papers you have, you have no such report or you would have put it in?

MR. COLLINS, JR.: Your Honor, what we have is two different types of reports, some made by mechanics who inspect and repair the engines, and some

reports made by engineers that happened to be at the place where the engineer goes to work. As far as I can see, we don't have any reports from any mechanics concerning the maintenance and repair of that engine.

THE COURT: You are speaking about inspection reports?

MR. COLLINS, JR.: Yes, your Honor. These are signed by mechanics.

THE COURT: Those are repair reports?

MR. COLLINS, JR.: Yes, all those are signed by an engineer when he goes to work, and he says, 'The oil is okay, the sand is okay,' and he doesn't do anything. We want to see the inspection and repair reports on that engine, and they haven't been produced.

MR. COLLINS, SR.: We have five reports, your Honor, from operators engineers, for the year, and two of them happen to fall on the day of the accident.

THE COURT: Mr. Griffin has now handed you approximately six to eight further inspection reports, is that right?

MR. GRIFFIN: No. Those -- I was just marking those exhibits that you had marked. I have given him what I had.

THE COURT: These are the same ones?

MR. GRIFFIN: I was just marking the exhibit number. I didn't give him anything else additionally.

MR. COLLINS, JR.: These that are marked as inspection reports are filled out by an engineer or fireman, they don't have anything to do with repairs made, and so forth. The other reports --

THE COURT: They have a lot to do with the existence of a defect.

MR. COLLINS, JR.: They do.

MR. COLLINS, SR.: There is three of them --

THE COURT: Particularly, as I understand your position, Mr. Parker would state, and this master mechanic would state, and Mr. Eggert has already stated, that it was useless to file inspection reports as to this type of condition because it had been reported, and reported, and reported and nothing had been done about it?

MR. COLLINS, JR.: Your Honor --

THE COURT: Isn't that your position?

MR. COLLINS, SR.: That is part of our position.

THE COURT: What I want to see is whether it has been reported and reported and reported.

MR. COLLINS, JR.: We don't have the reports.

MR. COLLINS, SR.: They state -- Mr. Eggert states over the years they reported these things and they don't do anything. There's five reports out of three hundred sixty five days in the year, with three shifts, close to one thousand employees at work, and out of it he has five reports for the year 1971.

THE COURT: I have nothing before me indicating that it is mandatory that there be an inspection report filed at the end of every shift. In fact, I accept Mr. Eggert's own testimony that he didn't do it at the end of this particular shift. He says he didn't do it because there were no report forms available.

MR. COLLINS, JR.: Your Honor, if I might cite the Court 49 Code of Federal Regulations 200.230 which says that there will be a daily inspection report -- this is the Code of Federal Regulations, which this Court must take judicial notice of -- there must be a daily inspection report made of all yard engines filed with the federal government and maintained by the railroad, which is obligated upon them by law.

THE COURT: Filed with the federal government and main-

tained by the railroad?

MR. COLLINS, JR.: Yes, your Honor. I will give you the cites. I am going to put it in the requests to charge anyway. The law also requires they -- the same code requires a fix and repair and inspect and have inspectors, quite an extensive area here --

THE COURT: Let me understand that regulation. You say this requires they be filed with the federal government?

MR. COLLINS, JR.: I may have it with me, your Honor.

MR. COLLINS, SR.: Before getting into that, on Plaintiff's Exhibit 33, this is one of their reports that Mr. Griffin brought in, signed by an engineer by the name of C. Houdak. It states at the top, and it states on the other forms, "Instructions. Each locomotive must be inspected in accordance with Rule 203 of the laws, rules and instructions for inspecting and testing of locomotives, other than steam, and reports made on this form whether needing repairs or not. Proper explanation must be made on the back of this form for failure to repair any defect reported in the form, approved by the foreman, before

locomotive is returned to service."

MR. COLLINS, JR.: All right, then let me read this, your Honor. 230.203, "Trip or daily inspection," which was in effect on June 21, 1971. This is from 49 Code of Federal Regulations, Chapter 2, Federal Railroad Administration. You will find this in the Federal Register.

THE COURT: Which I don't have.

MR. COLLINS, JR.: Yes.

THE COURT: I can't take judicial notice of it.

MR. COLLINS, JR.: You can take judicial notice of it.

THE COURT: I can of CFR.

MR. COLLINS, JR.: "Each locomotive unit when used in road service, including belt-line, transfer or work train service, shall be inspected at least once every twenty four hours, except locomotive units operated on through runs exceeding twenty four hours, may be inspected at the next crew change point immediately beyond the point at which the twenty four hour period expires. Each locomotive unit shall be inspected at least once during each calendar day. A report of the above inspections shall be made on an approved form to the proper representative of the

railroad whether such locomotive units need repairs or not. This form shall show the name of the railroad, the initials and number of the unit, the place, date and time of the inspection, the defects disclosed by such inspection, and the signature of the employee making the inspection. If any defects exist which constitute a violation of the Locomotive Inspection Act, or any Federal Railroad Administration rules and regulations thereunder, such defects shall be repaired before the unit is again used and proper notation made on the report to indicate that such repairs have been approved by the designated representative of the railroad, and shall then be filed in the office of the railroad at the terminal at which the unit is cared for. (b) A record shall be maintained on each locomotive, or on each unit comprising the locomotive, showing the place, date and time of the last previous inspection for each unit. (c) Any competent employee may be designated by the railroad to make the inspections required by this rule. (d) Any official or

responsible employee designated by the railroad may approve the inspection report. The unit may be used in further service without waiting for such approval, provided defects reported have been repaired as required by this rule. (e) This rule prescribes the minimum number of inspections that are required to be made and is not intended to prevent the railroad from making additional inspections. (f) The instructions on the approved form should not be varied from, nor should the form itself be materially altered. Additional items may be added to this form to cover anything the railroad may desire to have inspected." That is binding on the railroad by federal law, your Honor.

MR. GRIFFIN: Your Honor, it strikes me that we are not in a proceeding before the FRA as to the inspection procedure or when we operated the locomotive or when we didn't or anything like that. This is all totally beside the point, your Honor.

THE COURT: I am looking at the subpoena duces tecum, and I wonder why if this plethora of reports are filed or required to be filed, why have

we this puny production?

MR. COLLINS, JR.: It indicates in the terminal which would be Buffalo, New York.

MR. GRIFFIN: I have no idea. As I say, I produced what I had been given. Whether the locomotive is used everyday or what the situation is, I have no idea. But we know, for example, that this engineer testified that he made no report when he finished his tour of duty. Now, whether the railroad has another person who comes along to do what the engineer is supposed to do, I have no idea, but we certainly know --

THE COURT: For example on the two that I marked, Plaintiff's Exhibits 33 and 34, that the two individuals who signed on for the different defects, particularly, a Mr. Valone, who is indicated to be some kind of an inspector, signed on Plaintiff's Exhibit 33 in that second item relative to the missing front seat, and I think his name is on Plaintiff's Exhibit 34 also. I don't know if he is the one who signed as to the front seat.

MR. COLLINS, SR.: He did, your Honor.

THE COURT: He is some sort of an inspector, which does

bear out your inference that perhaps if the engineer doesn't do it there is somebody else around. Now, you have asked your people to respond to the subpoena duces tecum, you have produced the total of what they have given you. Is this a local search? What Mr. Collins, John F. Collins has read, would indicate that the reports are supposed to be kept locally.

MR. GRIFFIN: I do think that the railroad has only looked locally, to my knowledge. I'm not sure of that.

THE COURT: There must be someone who can come in and say that they have searched these -- well, we have four reports on it, two relate to March 7, March 9, June 21 and June 22, four reports.

MR. GRIFFIN: Your Honor, we are now dealing with a period of over five years since this accident happened. The railroad has no obligation to keep any of these reports, they could have tossed them out. Now, to what extent they have been tossed out and are not available, I don't know.

THE COURT: Somehow they didn't toss out four of them,

two in March, two in June.

MR. GRIFFIN: And many others, your Honor. I am not suggesting that they existed and were tossed out. Whether they existed or not I have no knowledge of. One of the reasons we have pretrial discovery is so that if somebody is interested in inspection records and questioning people as to procedures and all that, that is what you go about. Now, I'm not saying we don't have an obligation to comply with the subpoena, and to the extent that we were able to comply with the subpoena, we have.

THE COURT: If you couldn't respond because of lack of time or bulk of material or other onerous situations, of course you have an avenue for relief.

MR. GRIFFIN: That is right. On the other hand, suppose there is -- well -- it is all speculation. All I can say is that I am transmitting what has been given to me.

THE COURT: You evidently would have some individual who can say, 'This is all we have.'

MR. GRIFFIN: Pardon?

THE COURT: You evidently have some individual who can

walk into court and be sworn and say, 'These four reports are all we have relative to 2500.'

MR. GRIFFIN: I don't know that that is true that we have such an individual.

THE COURT: I don't know if it is true.

MR. GRIFFIN: I don't know if we have such an individual that can say that.

THE COURT: Someone must, you are not out of business.

MR. GRIFFIN: What happens is, obviously, this is served, and some person goes someplace where he thinks the reports are and looks for them. That is my understanding of what has happened. Whether this person knew all the places to look for them or not, I have no idea.

THE COURT: I don't know either, but you have to admit that the strong implication is that whoever made the search has not made a thorough search. The fact that four of these have jumped out of the blue is a pretty good indication that a lot more were on hand at one time. Whether there was some fire or other act of God which destroyed all the other records or they never were made out, I don't know.

MR. GRIFFIN: Well, I think the fair inference is that what occurred -- and I don't know this as a fact -- the fair inference is that here we've got a man who claims to be hurt on a locomotive, he claims some defect on a given date, so somebody probably says, 'Send me the reports that surround this particular accident, before and after,' okay, you've got those.

THE COURT: That is a very strong implication. As a matter of fact, they were asked particularly about the Parker episode in March, and they went into that and they found the report of March 7 and the report of March 9, and they regurgitated those. They knew that what Mr. Eggert is talking about occurred June 21 to 22 shift, so they again have particularly found and produced the inspection reports immediately before that time and immediately after that time. It looks to me like a very narrow response to the demand.

MR. GRIFFIN: No, your Honor. What I am suggesting is that years ago when the claims were made those reports were segregated from where

they existed and were put aside. Now we come in five years later and we are asked to produce on a couple of days notice reports for a whole year.

THE COURT: How would that explain the production of the two reports in March of 1971?

MR. GRIFFIN: Because I presume they went into a file that may be related to Parker and they were segregated there. I don't know, but I would guess that these are not filed according to engine, your Honor.

THE COURT: Parker said nothing in this report -- there is nothing said in the report that is made about the Parker accident, he makes no mention in there of any defect.

MR. GRIFFIN: As I say --

THE COURT: Out of what is there, there is no reason for anyone to particularly have taken an inspection report of the 7th and the inspection report of the 9th and pulled it out and kept it in a "Parker file."

MR. GRIFFIN: I don't know if that is true of not, your Honor. The Parker case -- I don't know, I didn't handle the Parker case -- I don't know what other contentions were made in the

Parker case, whether Parker made contentions in his case relative to anything, and somebody checked it out, I didn't handle that case.

THE COURT: Do you have a statement from Parker?

MR. GRIFFIN: Yes, I have a statement from Parker.

MR. COLLINS, SR.: You must know what he claims.

MR. COLLINS, JR.: Just to clarify one problem the Court is having. The Code deals with that problem of the inspector. Section 230.202 defines inspector. They say, "The term 'inspector' is used in the rules and instructions in this subpart means, unless otherwise specified, the railroad company's inspector." Then there is specific provisions on how the railroad trains their inspectors. They have a certain inspector that has to look over these reports. I think that is what the Court is referring to. It is not the engineer --

THE COURT: I am merely saying that engineer or somebody else, there is someone. Where the responsibility is fastened on the railroad, it designates somebody by category or by name to carry out the reporting, I assume. But,

Mr. Griffin, I get back to this, there must be someone who can enlighten me as to the response to the subpoena.

MR. GRIFFIN: That may be so. I mean, I deal with Mr. Jack Burchard, the claim agent. What happens, these subpoenas get served and they turn them over to the Claim Department, and the Claim Department goes -- they wanted a diagram, they wanted wage records. They called Cleveland and said send up the wage records. He went to another place and got a diagram. He went out to the Bison Yard and went through the -- as he told me -- certain files and got various reports --

THE COURT: They know, for example, what normally happens with these inspection reports. Are they sorted out by engine or kept in some form and place, are they destroyed after a certain period of time, if not, where are they, has anyone looked through them to see what is there relative to 2500?

MR. GRIFFIN: I assume Mr. Burchard could tell us what he did. He is a claim man, he has been here three or four years.

THE COURT: Again, you pushed the button with him, he

pushes the button with somebody else.

MR. GRIFFIN: He told me that he had to go out himself. You have to understand, your Honor, that as of April 1, 1976, that the Erie Lackawanna, you know, went out of -- Conrail took it over, there has been a tremendous amount of changes. Now, Burchard told me he had to go out -- he asked the clerk to do something, the clerk had another assignment -- he went out to the Bison Yard himself and looked. We had -- I think I had some xerox copies of something, and I said, "Mr. Collins always presses for the original, don't give me a copy, go out there and get the originals," so that is what he did. Whether there is more there, whether he looked properly, what happened, I have no idea. I didn't have anything to do with the search.

THE COURT: I have less of an idea.

MR. GRIFFIN: I know. I just don't see how it is pertinent to anything here. I just fail to see what we are about here.

THE COURT: It wouldn't be irrevelant if on June 15 there had been a report of an inoperative left front seat.

MR. GRIFFIN: That might be true, I agree with that, but in terms of the Parker situation, Parker's claim is there wasn't any seat at all or cushions.

THE COURT: I am not worried about Parker. I only cite Parker because it seemed he had come up with two reports in and about the time of the Parker incident, and come up with two other reports in and about the time of the Eggert incident and has come up with nothing else, as against the background where we should have a daily report when the engine is used.

MR. GRIFFIN: You can't say we didn't come up with anything else, we have. There's all sort of reports here. Here is a wad of them here.

THE COURT: Repair reports?

MR. GRIFFIN: It says Locomotive Inspection Report, January 30, 1971, February 20, February 22nd, February 22nd, February 26th, March 1, March 5th, March 5th, March 14th, April 16th, March 18th, March 20th, March 24th, March 24th, August 30th, September 1, September 16th, September 27th, and on and on.

MR. COLLINS, JR.: That is what we want.

THE COURT: These are inspection reports?

MR. GRIFFIN: These are.

THE COURT: How do they compare with the yellow forms?

MR. GRIFFIN: I think the yellow is Erie Lackawanna, and these are the Norfolk & Western. I don't know how often this engine was used on the Erie Lackawanna and how long on the Norfolk & Western.

THE COURT: I understood these were not inspection reports, they were repair reports.

MR. GRIFFIN: It says Locomotive Inspection Report.

THE COURT: Until this moment I did not know that. This sheaf of papers that you have handed me is what has been handed to you pursuant to the subpoena?

MR. GRIFFIN: In part, yes.

THE COURT: What do you mean "in part"?

MR. GRIFFIN: I have given them --

THE COURT: This is from the N&W?

MR. GRIFFIN: Right.

THE COURT: The subpoena went to the N&W, and this is what you got back from the N&W as to inspection reports on 2500 for 1971?

MR. GRIFFIN: That is what Mr. Burchard turned over to me. He said he got them out of the yard.

THE COURT: I see Mr. Valone's name in these reports also, J. Valone. The signature looks to me about the same as I recollect what it is on Plaintiff's Exhibits 33 and 34.

MR. GRIFFIN: Your Honor, can I point something out? Mr. Collins apparently read something, it says here, "Each locomotive unit when used in road service --"

THE COURT: Then he read something relating to the yard.

MR. COLLINS, JR.: It applies to both.

THE COURT: Let's see, mark these 38(a), 38(b) and 38(c).

(Thereupon reports referred to were marked Plaintiff's Exhibits 38(a), 38(b) and 38(c) for identification.)

THE COURT: All right, I have taken the package of papers which was handed to me as being the production of defendant Norfolk & Western Railway pursuant to the subpoena, wherein the subpoena asks for inspection reports relative to Engine 2500, and I have separated those into three categories, the first of which comprises seventeen reports on a Form MP-60, which also is said to be an

ICC Form 2-A, and the first one is dated January 30, 1971, and I have them in chronological order, and the last of those sheets is June 17, 1971, at 3:30 P.M. Then I have taken a single sheet and marked it 38(b) being that same form, and this is a report made at 6:45 P.M. on June 23, 1971. Then finally there are ten of those same reports, again in chronological order, which I have marked as 38(c), the earliest of those is 11:30 A.M. on July 19, 1971, and the latest is one made at 5:45 A.M. on September 27, 1971. Again, Mr. Griffin, I gather that all you know about it is that this is what was produced to you pursuant to your asking your claims man to give you the documents?

MR. GRIFFIN: Yes, your Honor.

THE COURT: Here, of course, we have what on their face would appear to be a more complete production, because I have this number of forms as opposed to only four that I received that were turned in from the Erie Lackawanna search.

MR. GRIFFIN: More than four, there is six or seven.

THE COURT: Are there?

MR. COLLINS, SR.: There's three here.

MR. GRIFFIN: Exhibits 3, 4 and 5, there's three more documents.

THE COURT: All right. 3 and 4 were received in evidence. 5 I never got any indication what it was, I made no note. That is an inspection report?

MR. GRIFFIN: Yes, your Honor.

THE COURT: What is the date on that?

MR. COLLINS, SR.: 3/6/71.

THE COURT: We have seven reports produced there.

MR. COLLINS, JR.: Your Honor, if we can note for the record, three of the reports, 36, 37 and 39, reveal that the railroad was allowing this particular engine to run on their railroad without any front seat on it. We have replaced front seat, replaced front seat, replaced front seat. So the inference we get from the evidence is that they never replaced the seat as of 39. We don't know --

THE COURT: We know it was replaced prior to Mr. Eggert's shift on 6/21/71.

MR. COLLINS, JR.: We don't know that for sure.

THE COURT: Mr. Eggert says it was there.

MR. COLLINS, JR.: What is indicated on the report of Mr. Parker was that he struck the front seat stand, and,

you know, he told me personally --

THE COURT: That is different from what you said before.

MR. COLLINS, JR.: No, he struck the --

THE COURT: You said there was no padding on it.

MR. COLLINS, JR.: Nothing, just a stand he hit, that is what he said. Now, the implication, as we see it, is that it wasn't repaired on the 6th, 7th or 9th, it wasn't repaired on the 11th either.

THE COURT: It had been repaired prior to June 21, 1971.

MR. COLLINS, JR.: Yes, but part of our claim is Mr. Eggert was under the same circumstances on the same railroad. They had a defective seat and didn't repair it and let it go back on that railroad, and it continued in violation of the Federal Code, in violation of their obligation for daily inspection and repair and a report to be filed, and that is --

THE COURT: Mr. Eggert, himself, said he wouldn't report this defect.

MR. COLLINS, JR.: But --

MR. COLLINS, SR.: He said he would have if he had reports there.

THE COURT: No, he wouldn't, he would only report it if it were on the floor.

MR. COLLINS, SR.: That is true. He said they don't do the work anyway. Let me state, your Honor, that in Defendant's Exhibit 5, which you said you don't know whether it is in evidence or not --

THE COURT: It is not.

MR. COLLINS, SR.: -- it has a defective seat, it has the same signature there, Mr. Valone, who is an air brake inspector, according to the designation down below. He signed under Column C and on the back it says, "Column C. The workman who works upon and properly finishes an item of work reported in Column B shall evidence the fact that he has sone so by signing his name opposite such item in the space provided for his signature in Column C." So Mr. Valone three days in a row states that he has worked on that, and we wanted to bring in Mr. Parker to say there wasn't a seat for a period of a week, while they are stating they are finishing the work.

THE COURT: No, there is no pertinency.

MR. COLLINS, JR.: It is evidence of past conduct of the railroad, negligent conduct, a violation of the federal laws.

THE COURT: In a way that has nothing to do with this particular event.

MR. COLLINS, JR.: Your Honor, it shows the conduct of the railroad over a period of time, and the allegations in the interrogatories is that they didn't assign any workmen to repair the seat, they didn't fix the seat, they didn't maintain the seat. Here we have direct evidence in March of the same year that they did the same thing, they didn't repair that seat, they didn't abide by the rules. You will see on the back of the Diesel Equipment Inspection Report that has been offered that it says, "Foreman's explanation of work reported but not performed," and all three of them are blank. They are saying they did all the work. We have evidence they didn't do the work. That is the same case we have here with Mr. Eggert. He said that that seat was defective, there is no report, they didn't send a repairman, they didn't do anything, 'They sent me back on the engine, the seat was defective and I got hurt.' It is the past practice of the railroad. It is so close, it isn't

even two months behind, it is the same engine, it just cries out.

THE COURT: More than three months.

MR. COLLINS, JR.: You have March, April and May, it is more than three months, but it is the same engine, the same report, the same --

THE COURT: Not the same defect.

MR. COLLINS, JR.: The seat, your Honor.

THE COURT: Not the same defect, and the evidence shows that the defect that was reported March 6th, March 7 and March 9 was repaired prior to this accident.

MR. COLLINS, SR.: The evidence shows it, your Honor. It shows it was repaired on the 6th, then again on the 7th it is signed the same thing, hen again on the 9th, then none on the 10th, 11th, and Parker can testify during the entire time the seat wasn't repaired, although Valone says it is.

THE COURT: What I am saying is that even if Mr. Parker would come forth and say that this seat was still missing as of 5:40 A.M. on March 11, 1971, the other evidence in the case shows that after that time it was repaired.

MR. COLLINS, JR.: The testimony of Mr. Eggert is that it was

defective, they didn't repair it, they didn't inspect it, your Honor.

THE COURT: But it wasn't this defect that was talked about on March 6, 7 and 9.

MR. COLLINS, JR.: Aside from the particular defect, what we are saying is the railroad has a pattern of conduct that it performed in the past. It didn't do it in the past, it didn't do it this time. Look at what they did in March, that is incredible evidence, they didn't do it.

THE COURT: There is no indication that the defect of which Mr. Eggert speaks of as existing on his shift on June 21 and June 22 of 1971 ever was reported to the railroad.

MR. COLLINS, JR.: Your Honor, what we are talking about here is the federal obligation to inspect and repair and maintain the locomotive. We said on March 6th they had it, they didn't do it. On March 7th they had it, they didn't do it. March 9th, they didn't do it. Mr. Eggert said the defendant Norfolk & Western failed to provide the plaintiff a safe engine, knowing said engine was unsafe, the defendant failed to properly

inspect the said engine, and failed to dispatch any mechanics, car repairmen or other employees to rectify the condition. What we are saying is that we have the same situation in March, the past practice of the railroad not to repair, not to inspect, not to maintain them. Here is evidence, here is what they did this time.

THE COURT: Now, Mr. Griffin, what we need is something from the defendants showing what the search has been or what the overall existence of this type of report is. We have this group of some twenty reports on this engine made out on the N&W forms, and we have seven relating to this engine made out on Erie Lackawanna forms. Now, someone should appear here in court who would know and be able to say what the search was, whether or not this is all that existed or all that can be found, or all something, otherwise I have an implication of missing reports. Of course, it may be that Engine 2500 was not used at any other time than these days for which you have reports, I don't know about that. I don't know if any records

exist as to whether that is true or not.

MR. GRIFFIN: Your Honor, obviously, I am an officer of the court, whatever the Court directs me to do --

THE COURT: You see the situation?

MR. GRIFFIN: No, frankly I don't. I don't think there is any justification to have other people come in here but --

THE COURT: What do you normally do when someone is handed a subpoena duces tecum? Doesn't that command someone to come into court with the production, isn't that the meaning of a subpoena duces tecum?

MR. GRIFFIN: Well --

THE COURT: Come in with you.

MR. GRIFFIN: Bring in.

THE COURT: Bring into court.

MR. GRIFFIN: That is right, your Honor, and I say that is what we have done.

THE COURT: At the same time you were admitting that you don't know.

MR. GRIFFIN: Absolutely.

THE COURT: Someone has handed something to your claims man or he has gotten something, and he handed that to you, and you have come in

and admittedly you don't know whether this is the totality of what is around or not.

MR. GRIFFIN: I think Mr. Burchard goes to a person who is a clerk out in the Bison Yard, I think it is a lady who knows the procedures, and I think that is the source where he --

THE COURT: If he were there with her and, you know, went out there and said, 'Mrs. Clerk, here's what I want to find,' and she then conducts a search and says, 'Oh, yes, these are that category of document,' and she or he or someone else is there who looked through and culled out these seven Erie Lackawanna reports and twenty some Norfolk & Western reports, says, 'This is what we have.' Fine.

MR. GRIFFIN: If your Honor wants me to, I will be glad to have Mr. Burchard come in and this clerical person --

THE COURT: If Burchard knows the situation there is no need to have the clerk here.

MR. GRIFFIN: I am not sure he knows.

THE COURT: He may have done it by telephone, also.

MR. GRIFFIN: Yes. I will bring them both in, if there is such a person. I regret that such a

delay is --

THE COURT: If you were able to stand here and say, 'This is all that exists, this is all we have,' I would take your word on it, but you can't say that. You have produced everything that was given to you.

MR. GRIFFIN: Given to me as engineers and workmen's reports, and --

THE COURT: I take it on that basis.

MR. GRIFFIN: -- and whether any more exists, I have no knowledge.

THE COURT: All right.

MR. COLLINS, JR.: Your Honor, we would, I am sure the Court is aware, would request the Court to take judicial notice of 230.200(a), "The railroad company is held responsible for the general design construction, inspection, and repair of all locomotives used or permitted to be used on its line. It must know that all inspections, tests and repairs are made and reports made and filed as required," and it continues on. We are going to request the Court that you charge the jury along those lines in all requests to charge. This is a federal obligation on the railroad to

keep these and maintain them. If they are not doing it, that is part of our allegation as to the way they run their railroad.

THE COURT: I will deal with that separately. You are talking about Mr. Godwin, and Mr. Bethge, and you purport to bring in Mr. Bethge as an expert?

MR. COLLINS, JR.: Your Honor, he has approximately seven years on the railroad as a railroad brakeman in the handling and switching of cars. He is also the local chairman dealing with the requirement of air in cars on movement within and about the yard, and we purport to offer some testimony by Mr. Bethge on those conditions.

THE COURT: All right. Mr. Godwin would also testify about the requirement of air in cars in making switching movements, you would be offering him as an expert?

MR. COLLINS, JR.: Yes, your Honor, an engineer of approximately seventeen years senority, with extensive experience in the operation of road engines and yard trains, and also the local chairman for the Brotherhood of Locomotive Engineers,

familiar with the requirements of air, and so forth.

THE COURT: Mr. Griffin, we have evidence in the case at this point, obviously just Mr. Eggert, that there was no air in the twenty or so cars. Do defendants intend to introduce any contradictory evidence to that fact?

MR. GRIFFIN: No, your Honor. I don't propose to ask him any questions about it.

THE COURT: Or produce any witnesses?

MR. GRIFFIN: None whatsoever.

THE COURT: Therefore there would be no need to have anyone else come in and say that. The only evidence in the case would be to that effect, and in.

MR. COLLINS, JR.: We also propose to have Mr. Godwin's testimony about the wages that Mr. Eggert could make on the extra board as a healthy individual. Mr. Godwin is the local chairman that regulates the extra board. I think there is testimony that Mr. Eggert can't work on the board, that is where you make your money on the railroad, but because of his physical disability, he can't go out on the road on the board and work the board.

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THE COURT: As to 1(a) and as to Item 4 and Item 5, I would want to see what further we get from the defendants as to what we have in these inspection reports. I will not allow Mr. Godwin to testify about 1(b) or 1(c), nor would I allow Mr. Bethge to testify according to Paragraph 2, nor would I allow members of the ground crew to come in and testify as to Point 3.

MR. COLLINS, JR.: On what grounds?

THE COURT: It is unnecessary in the case. The only evidence we have is already there as to what they would say, no air in the cars.

MR. COLLINS, JR.: It is the Court's ruling that the earnings of an engineer on the extra board is unnecessary to the case?

THE COURT: Right. Not unnecessary, but this was something that should have been anticipated, and is nothing that has come up out of any of our recent happenings yesterday and today in the case. If it was to be in the case, it should have been in originally. Consequently, my enjoinder of bringing him in is on the basis of no prior notice that he would be a witness.

MR. COLLINS, JR.: By Mr. Lankes, your Honor, or by us?

THE COURT: By the plaintiff.

MR. COLLINS, JR.: Okay. Now, as far as the testifying about the filling out and availability of locomotive inspection reports --

THE COURT: I am reserving on that until I see what we can get from the defendants.

MR. COLLINS, JR.: As far as Number 4, your Honor, you are denying that?

THE COURT: I am reserving on that and Number 5 until I see what I get from defendants.

MR. COLLINS, JR.: Thank you.

THE COURT: Now, I am available to you any time, Mr. Griffin, as soon as you can have somebody come in.

MR. GRIFFIN: I would be sure I couldn't do it today, your Honor.

MR. COLLINS, SR.: We don't have a jury.

MR. GRIFFIN: This wouldn't be in the presence of the jury?

THE COURT: Of course not.

MR. GRIFFIN: Could we do this perhaps at ten, ten thirty tomorrow morning?

THE COURT: You say that you can't get anyone today, how do you know that you can't?

MR. GRIFFIN: Well, in order to be helpful, your Honor, I've got to go and pick up Mr. Burchard. I have been working with the railroad a long time --

THE COURT: Where is he?

MR. GRIFFIN: 1221 Clinton Street. I have to see if he is in his office, and I've got to drive him out to Clinton Street and see if this person --

THE COURT: Not if he is there and on the scene.

MR. GRIFFIN: Believe me, your Honor, if you want to -- everybody wants to make sure that an exhaustive search has been made. A year ago we had an incorrect -- urbaniak -- an incorrect box car number. I have to go out and say okay, let's look here, let's look there.

THE COURT: If that is what is needed, that is what is needed.

MR. GRIFFIN: I haven't done it in this case yet because of --

THE COURT: If this is what you think is required.

MR. GRIFFIN: I am going to call them now and drive out to the office now and go through the drawers and ask the questions.

THE COURT: All right. We then could have a report on this, and I am certain that if you stand

here and say such and such, that neither Mr. Collins is going to say that you are telling something that is not true, as far as the completeness of production.

MR. GRIFFIN: No, I'm going to bring the people in. I've got to find them, I've got to push them through the drawers and that sort of thing. I am not going to be a witness until the Court orders me.

THE COURT: I wasn't compelling you to be a witness. I wouldn't put you under oath on it. Why not nine o'clock in the morning?

MR. GRIFFIN: Well, what I anticipate, the person's tour of duty is ended around now, and we will have to be out there at eight o'clock in the morning. I would be glad to call the Court and counsel at nine o'clock and say if we can come, we are on our way.

THE COURT: They would be with you, and as soon as you were able to get in they could be here?

MR. GRIFFIN: Right. Unless they say that some of these reports went to Marion, Ohio, and we haven't called Marion.

THE COURT: We could say that at nine o'clock or as soon thereafter as Mr. Griffin, et al. are

available?

MR. GRIFFIN: I will check in with everybody at nine o'clock.

THE COURT: All right.

MR. COLLINS, JR.: Your Honor, we beg the Court's indulgence on this. If this was our case from the beginning, this wouldn't have happened.

THE COURT: You recognize, of course, that that is no excuse.

MR. COLLINS, SR.: On other cases we have these problems with the Erie Lackawanna, as on our pretrials, and they keep delaying, and we can't find the records, and these are cases where the accident happened within four or five months. It is just something that we have been running into.

THE COURT: What Mr. Griffin mentioned earlier is, of course, a fact of life with these railroad cases from and after April 1, that even after settlements, sometimes there is great difficulty in getting paid, all kinds of problems out of a new arrangement.

THE COURT: All right, until tomorrow.

CLERK: Do you want the jury ordered in?

THE COURT: Yes.

MR. COLLINS, JR.: We are going tomorrow then?

THE COURT: Yes.

MR. COLLINS, SR.: This hearing in the morning will be outside the presence of the jury to determine whether they have answered the subpoena properly, is that it?

THE COURT: That is right, and, of course, it may be that following that there would be testimony in front of the jury by the proper person, who the jury also might -- I say "might" I don't know what my position would be -- have a right to know the effect of what has been produced, whether or not in fact there are other inspection reports or should be other inspection reports that have not been produced. As I say, we might reach that point. I will decide that off what we get. Of course, if whoever comes in states fully that this is everything, that they have looked every place, then, of course, it might be again that should be put before the jury because then the inference is in the other direction, namely, that we have all the reports.

MR. COLLINS, JR.: Thank you, your Honor.

THE COURT: All right.

MR. GRIFFIN: I shouldn't -- perhaps what I am about to say invades the province of the Court, but I am wondering whether it would be better to have the jury in at ten or thereafter or --

THE COURT: We will bring them in. Unfortunately, we have to have them cool their heels from time to time, but we try to keep that to a minimum, but I think it is better that they be in to work.

MR. GRIFFIN: May I leave quickly so I can get on the phone to Mr. Burchard?

THE COURT: Yes.

(Thereupon the court was in recess at 3:40 P.M.)

Transcript of Proceedings, October 8, 1976.

VOLUME IV

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT,

Plaintiff,

-vs- CIVIL 73-370

NORFOLK & WESTERN RAILWAY COMPANY, and
ERIE LACKAWANNA RAILWAY COMPANY,

Defendants.

PROCEEDINGS OF OCTOBER 8, 1976

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Transcript of Proceedings, October 8, 1976.

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:20 A.M.

(Jury absent.)

MR. GRIFFIN: Before explaining further to the Court, and for the purposes of the record, and to counsel, as I indicated not only last night to Mr. Collins but this morning, and late yesterday by telephone to the Court, we have made a check and find that the records that we had produced and the search that was made for these records was in the Buffalo terminal, and that no search has exhaustively been made through the other parts of the Norfolk & Western terminals or the Erie Lackawanna. I would like to say this about this particular subpoena and the subpoenas served in these cases. We regularly have the situation in these various cases where Mr. Collins is on one side and I happen to be defending and on the eve of the trial we receive a subpoena that is relatively extensive. Seldom, if ever, have I made a formal motion to quash the subpoena. We do it

on an informal basis, to try to cooperate relative to the records. We try not to raise technical objections or say we don't have enough time. For example, in this case the subpoena was served late Friday and required a response Tuesday morning. Improper persons were served, we did not raise that. Insufficient fees were issued, we don't raise that. Various items of work product are specified in the subpoena, such as statements that we have secured or perhaps one could interpret -- if we had a person go out with the claims man and look at the locomotive after the accident, and he has some views on the subject or something like that -- there is a certain degree of interpretation that is done by me in all of these cases, and I don't march in with motions to quash because they are generally unnecessary. Indeed I did not in this case. Mr. Burchard, who is here, can explain the search he made, and he produced the various items under the subpoena, and I turned those over relative

to these work reports or inspection reports made by the engineers and the workmen in the regular course. When I did that on -- I think I produced them for Mr. Collins on Wednesday -- Mr. Collins did say to me, "Is that all that you have?" I said, "Yes, those are the ones made in the regular course by the workmen that I have been given, and here they are." I was not conscious at that time that no complete search throughout the systems had been made, and therefore I turned over what I had, and I didn't know there may be more reports existing. We think, incidentally, that there probably are other reports that would be in the Norfolk & Western system because that was a Norfolk & Western engine, and it was here in joint use at the time of this accident, and certain other occasions of both the Erie Lackawanna and the Norfolk & Western at this joint Bison Yard. We suspect that when it was not in that operation, it was at other terminals, it was probably at Norfolk & Western terminals throughout the system. So that is the explanation relative

to no motion to quash because we didn't have sufficient time. As I say, this is the way the subpoenas are handled, and I am not suggesting that Mr. Collins should have said, 'Griffin, have you searched the whole system, there must be more records throughout,' nor did I appreciate that that had not been done. But that is where we are, and I think we have made the usual good faith response to try to cooperate with the subpoenas. As I say, there are any number of items in subpoenas, and I will say to Mr. Collins, "I won't give you this, I won't give you that," and I just say that we don't do that in motions to quash, we don't raise the technical objections. I wanted to explain that for the record, so that the way these are customarily handled is fully understood.

MR. COLLINS, JR.: If I may respond briefly? First of all, the reports we have asked for are required by the Code of Federal Regulations to be kept in the home terminal. If the railroad is abiding by the law and the Federal Code of Regulations, I don't see how it would be

an unnecessary burden on the railroad. In all the railroad cases, and it is true that we try them with Mr. Griffin, and in every case where I am involved and I serve a demand on the railroad, I serve a demand for interrogatories on the railroad, I ask them specific questions, I ask for specific inspection reports, I ask for specific union reports, and I never get them. I always get, 'We are looking for them, we are looking for them, we don't have them, we can't find them,' so that when it comes to the eve of trial, we have no remedy left except to bring a subpoena and serve Mr. Griffin and say, 'If you won't respond to the interrogatories, maybe you will respond to the subpoena,' and that is the problem we have had in all these cases. As the Court pointed out yesterday, it seems ironical that the railroad can find the reports for the day before and the day after the accident but they can't find any in between. They brought five forward. Mr. Griffin knew this case was coming, and he knows the way we practice law. He never

has them, he comes in the same way and makes the same excuses.

THE COURT: My comments relative to the seeming coincidence of being able to find the inspection report immediately before and immediately after, and immediately around the Parker incident, were made prior to the time I knew we had a batch of some twenty Norfolk & Western inspection reports. At that point we were dealing -- we had four that I knew of, and I didn't know at that point that Defendant's Exhibit 5 was another Erie Lackawanna inspection report, and then it developed there were two more, I think we have a total of seven Erie Lackawanna inspection reports. Now, fed into that situation is somewhere between twenty and thirty Norfolk & Western inspection reports, which I have marked as 38(a), (b), and (c), and my comments really are no longer applicable. There is a rational for there not being any more than perhaps seven, seven Erie Lackawanna inspection reports, inasmuch as what we are talking about is a Norfolk & Western engine which, from time to time, and I gather by inference,

mainly here, is used by Erie Lackawanna. There wouldn't be any burden on Erie Lackawanna to comply with any Code of Federal Regulations, as far as the inspection reports or anything else, except at times when they were using the engine.

MR. COLLINS, SR.: Your Honor, do you forget that the N&W is also a co-defendant, and that Mr. Griffin represents both.

THE COURT: Please, you are not listening. Your son said -- he referred to a remark that I had made about the coincidence of only getting these particular ones, and I said when I said that it was at a time before I knew that we had between twenty and thirty Norfolk & Western inspection reports. Now, he rips my statements out of that context and places them in this context. He is misusing them. It would seem to me that is perfectly understandable that there may have been only seven Erie Lackawanna inspection reports. Now, we have between twenty and thirty of the Norfolk & Western inspection reports, which I have marked as 38(a), (b) and (c). Now, again if there is, as

there must be, a daily report as to any engine in service, I assume it applies only when they are in service, and when they are stuck away in a roundhouse for a week they don't have to fill it out everyday of that week, at least in the time it was in service there would have to be a report filled out and kept at the home terminal, kept by Norfolk & Western at some place. Now, we have these between twenty and thirty, and obviously this does not cover the full year, so there are some missing reports. Mr. Griffin says that the probable answer to that is because they can find no more here, and I assume we will have testimony in that regard, so that the engine was elsewhere at another terminal, and at the other terminal daily reports were filled out and filed, and inferentially are there located. They have not made a search of the other terminals for what might be there.

MR. COLLINS, JR.: Your Honor, if that is the railroad's position, we are prepared to offer testimony that the N&W 2500 on other occasions was sitting there, was not inspected, was reported

defective, and no effort was made by the railroad to correct it, to inspect it or to even see that there were inspection reports on the engine. The N&W 2500 was sitting at Black Rock with the chair broken for approximately one week, and it was reported everyday.

THE COURT: I have already ruled on the admissibility of the Parker situation, and I am not changing my mind on that. I am not going to allow that testimony in.

MR. COLLINS, JR.: Your Honor, I miss the basis, on what basis is the Judge not letting the testimony in of our claim that is in the interrogatories, that the railroad doesn't send out mechanics, doesn't perform the inspection, doesn't do the proper type of repair, which as we claim is negligence? We claim --

THE COURT: Too far removed in time, completely different situations, even though it involves the seat --

MR. COLLINS, SR.: The same engine.

THE COURT: -- a single episode which would not be probative of a course of action.

MR. COLLINS, JR.: It went on for a week, everyday they reported

it, it wasn't repaired, and we went to offer testimony on that. You are denying us --

THE COURT: I know. The question is that we have an incomplete production of inspection reports, that is what we need to address ourselves to. Within your knowledge, Mr. Griffin, what sort of records are maintained by the Norfolk & Western as to the whereabouts and utilization of a particular piece of equipment, such as this engine?

MR. GRIFFIN: Your Honor, I frankly have no knowledge of that. I am not familiar with the procedures on the Norfolk & Western. I am handling the defense here because this is a joint operation in the Bison Yard, as you know. I do not regularly appear for the Norfolk & Western. I never have appeared for them or actually tried a case on their behalf.

THE COURT: What does the Erie Lackawanna do, as far as keeping records of where its equipment would be, which, of course, would not be Engine 2500?

MR. GRIFFIN: Mr. Burchard advises me -- I was with him yesterday afternoon and with the clerk --

what the Erie Lackawanna does in the Buffalo yard here is they have a box for each month, and Mr. Burchard advises me, and he showed me the box for 1971 that he went through, and they are large cardboard boxes --

THE COURT: Inspection reports?

MR. GRIFFIN: Yes.

THE COURT: What type of record would Erie Lackawanna have, as a comparable railroad, of the whereabouts and utilization of a particular piece of locomotive equipment?

MR. GRIFFIN: You mean a central record as to where a given locomotive was at any particular time?

THE COURT: Does no one keep track of where Engine 99 is today?

MR. GRIFFIN: They may, I'm not sure. They do have -- there was some discussion, for example, yesterday that there is -- you might, for example, with the Norfolk & Western check with power control out of Conneaut, Ohio, and they may have records of where a given unit of power is at any time. Railroads keep an abundance of records, and I would suspect there is a way, given proper searches

and time, and all that, to establish where an engine is at any given time, where it was, even years ago. There's hundreds of records that exist on railroads, your Honor. I would guess there's ways to establish that.

MR. COLLINS, JR.: If I may assist the Court, the engines that would be in the Bison Yard would be required to be serviced regularly, in terms of having diesel fuel put in, in terms of having water checked, and so forth. There is a shop in the Bison Yard called the diesel service track, which keeps records of every engine that is serviced, when they go out and fuel it, when they go out and inspect it, and so forth. I would submit that Mr. Griffin would only have to check that diesel shop over in the Bison Yard for the records for 1971 for the month of May, June, April and July, and he would see if this 2500 was in the Bison Yard and was being serviced regularly, was getting fuel. There is a record kept, they have to know when they have to refuel it, and so forth, and that would be a place to start the investigation

for the records that we have requested. They also keep repair records because that is where they do repairs. If they are major repairs, they send them to Hornell, New York, and they could check those shops.

THE COURT: You have some testimony to put on concerning the completeness of your production, do you want to do that with the jury or not?

MR. GRIFFIN: No, unless the Court directs me to.

THE COURT: I want something in the record concerning the search of the records.

MR. GRIFFIN: I would be glad to put Mr. Burchard on for that purpose.

J A C K T. B U R C H A R D, 65 The Avenue, Cheektowaga, New York, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRIFFIN:

Q. Mr. Burchard, are you presently employed by the Consolidated Rail Corporation?

A. Yes.

Q. And in what capacity?

A. As a personal injury claim agent.

Q. As a personal injury claim agent did you go to work for

Consolidated Rail Corporation, a separate corporation, as of April 1, 1976?

A. Yes.

Q. Prior to April 1, 1976, were you employed by the defendant in this case, the Erie Lackawanna Railway Company?

A. Yes.

Q. As a claim agent?

A. Since November 1967.

Q. And how long have you worked in the Buffalo area as a claim agent?

A. August 1, 1973.

Q. All right. And is your office at 1221 Clinton Street in Buffalo?

A. Yes, sir.

Q. Now, have you -- strike that. Did there come to your attention that a subpoena was served on the defendant Norfolk & Western and on the defendant Erie Lackawanna, that is, a subpoena was left with someone purported to be a proper agent of those defendants, within the past few days?

A. Yes.

Q. When did you first learn about those subpoenas?

A. I would say mid-morning Monday, October 4th.

Q. And did you do various things in order to produce records that were specified under that subpoena?

A. Yes, I did.

Q. For example, there was a request for a diagram, which is Plaintiff's Exhibit 2, did you go searching for a diagram in response to the subpoena?

A. Yes.

Q. The subpoena asked for certain wage records, what did you do relative to obtain the wage records?

A. Well, fortunately we did receive a response.

Q. I asked you what you did.

A. Right. I had to call the accounting bureau in Cleveland, Ohio, and request earning reports for 1969 through 1976, and did receive very fortunately, as I say, the cooperation, and received by special delivery the earnings.

Q. Now, relative to work and inspection reports in the regular course of business for Locomotive 2500 for the year 1971, did that portion of the subpoena come to your attention?

A. Yes, sir.

Q. Would you tell the Court and everyone what you did relative to that portion of the subpoena?

A. Well, in the absence of other help, I, myself, personally went to the yard and went through twelve dirty boxes of records.

Q. When did you do this?

A. I'm not sure. Was it Tuesday afternoon -- Wednesday afternoon.

Q. And now, when you say the yard, is this an office that is located in the area of the Bison Yard, which is the joint facility of the Norfolk & Western and the Erie Lackawanna?

A. Yes, the office is located near Halstead Avenue.

Q. And how are the records kept out there, whose general office is that, what is the general office?

A. It was originally until recently the master mechanic's office.

Q. To your knowledge, is that where that type of record that you understood was being requested was kept?

A. Yes.

Q. And what is the office called now?

A. I really don't know. The job has been abolished. The chief clerk remains there.

Q. What is his name?

A. Walter Christ.

Q. Is he the same person who was the chief clerk back in the years '71, '72 and '73?

A. Yes, I believe he was.

Q. Did you confer with him relative to where you might find records?

A. Yes.

Q. Did he point out to you where the records were?

A. Yes, sir.

MR. COLLINS, SR.: Your Honor, I realize this isn't in front

of the jury, but I don't think Mr. Griffin should testify and lead the witness.

THE COURT: All right, don't lead the witness.

BY MR. GRIFFIN:

Q. Did you confer with Mr. Christ?

A. Yes, I did. He pointed out where the boxes were, I made the search.

Q. Now, describe what the boxes contained?

A. They contained both Erie Lackawanna and Norfolk & Western inspection reports of various locomotives filed in numerical order for each month of the year.

THE COURT: What do you mean "numerical order"?

THE WITNESS: In sequence.

BY MR. GRIFFIN:

Q. Sequence of locomotives?

A. Yes. In other words, the 2500 series, and so on, each kept with rubber bands tied around them.

Q. And did you make a complete search for the year 1971?

A. Yes.

Q. How many boxes did you go through?

A. Twelve.

Q. And did you take out --

THE COURT: A box for each month?

THE WITNESS: Yes, they are labelled each month of the year.

BY MR. GRIFFIN:

Q. Did you take out of each box for each month of the twelve months of the year 1971 a . . he reports that you found therein relative to N&W 2500?

A. Yes, I did.

Q. Did you then turn those over to me for production in court?

A. Yes.

Q. Now, did you contact any other terminal or office on the Erie Lackawanna?

A. No. I did what I felt was the normal course of our duty.

Q. I am asking you what you did, Mr. Burchard, did you contact any other terminal or office of the Norfolk & Western, other than in the Buffalo area?

A. No.

Q. I take it that you have no personal knowledge of where Locomotive 2500 was on each and every day of the year 1971?

A. No.

MR. GRIFFIN: Unless the Court desires me to ask further questions at this time --

THE COURT: No. Do you want to ask, Mr. Collins?

CROSS EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Burchard, you are now the personal injury claim agent for the Erie Lackawanna or for Conrail?

A. Yes.

Q. Whatever railroads have combined. Now, back in --

MR. GRIFFIN: I object to it. I don't know what significance it may have, but I object to the form, because he said, 'You are the personal injury agent for Conrail or Erie Lackawanna,' and the witness said yes. I don't know what that is in answer to.

THE COURT: It is not clear.

MR. COLLINS, SR.: I said or whatever railroads have combined.

BY MR. COLLINS, SR.:

Q. It is now Conrail?

A. It is now Conrail.

Q. Back in 1971 you were employed by the Erie Lackawanna Railroad?

A. Yes.

Q. And at that time were you --

THE COURT: You became a claim agent in 1973?

THE WITNESS: No, I became a claim agent in November 1967.

THE COURT: I am sorry.

MR. GRIFFIN: He came to Buffalo in 1973.

BY MR. COLLINS, SR.:

Q. Prior to coming to Buffalo were you the claim agent in Hornell, New York?

A. No, I was at Scranton, Pennsylvania.

Q. At one time you worked in Hornell?

A. Yes, sir.

THE COURT: What has that to do with it? You seem to

be getting far afield.

BY MR. COLLINS, SR.:

Q. You actually were born around Hornell and lived there?

A. Yes, sir.

Q. In 1971 did the Erie Lackawanna have one of its main repair shops in Hornell, New York?

A. I believe they did.

Q. They still do, don't they?

A. I am not sure since April 1.

Q. Now, you said you made a search for records, did you contact Hornell and the Hornell Office to see what repairs had been made to this engine, M&W 2500, after receiving this subpoena?

A. No, I didn't.

Q. You said you were fortunate, you received a response from Cleveland. By "fortunate" what did you mean, you were lucky if you get one?

A. Well, on such short notice, yes. It all takes time.

Q. This case was tried last October, was there a subpoena that was issued similar to this one issued at that time?

A. I don't believe there was.

Q. Are you positive?

A. I'm quite sure.

Q. Did you do any research at that time for inspection reports or anything?

A. No.

Q. This case had been pending since June of 1971, isn't that true?

A. That is the date of it, I don't know how long really --

THE COURT: June 21st.

BY MR. COLLINS, SR.:

Q. Since that time the Claims Department has been aware that there is a personal injury claim?

A. Yes.

Q. And when you took over the duties in 1973 you became aware that this claim was pending on behalf of Mr. Eggert?

A. Yes.

Q. Prior to that was Theodore Wynn the claim agent here in Buffalo?

A. Yes.

Q. He had been with the railroad for at least thirty some years, hadn't he?

A. I'm not sure.

Q. It is close to that, isn't it?

A. I assume, yes.

Q. He handled these duties before you came?

A. Yes.

Q. All right. I think he actually took pictures of this 2500 after the accident, do you know that?

A. I'm not sure. I believe he did, I'm not sure.

Q. Did you bring some pictures down and give them to Mr. Griffin?

A. No, I didn't.

Q. You never saw the pictures of the locomotives that were put in by Mr. Griffin?

A. No.

Q. Mr. Wynn took those pictures on June 22nd, do you know that, 1971, of your own knowledge?

A. No, I'm not sure whether he did.

Q. You never saw those pictures?

A. That is quite a while before I came to Buffalo.

Q. After you took over the Claim Department here in Buffalo did you ever see these pictures?

A. I don't recall, no.

Q. Then you don't know who went out with Mr. Wynn to inspect that engine the afternoon of the accident, do you?

A. No, I'm not sure.

Q. Now, as far as inspection reports -- how about repair reports, I don't think we have gotten into those, does the railroad have a record of repairs it does?

A. There again, I am not familiar with the Mechanical Department, whether they are here in Buffalo or not, I don't know.

Q. Somebody here in Burfalo is familiar with it, aren't they?

A. Should be.

Q. And would that be the chief clerk, Walter Christ?

A. Well, those records are in his office. Whether he oversees

the repair reports, I don't know.

Q. You didn't make a search for the repair reports, it was just the inspection reports?

A. Yes.

Q. Now, you said that you took all of these, and the Judge has indicated that there are some twenty five or possibly twenty six Norfolk & Western reports, you took those out of the reports that were located out here in the Bison Yard office?

A. I got everything that was labelled N&W 2500, both Erie Lackawanna and Norfolk & Western.

Q. Is it your contention that these reports that were out there were the only reports that were made here in Buffalo?

A. Yes, at the Buffalo terminal.

Q. And they have -- like if the engine were in Conneaut, they would have other reports in Conneaut?

A. I am not sure. I am advised these records are -- they can destroy them after a period of five years. The reason we had these in Buffalo is due to the Consolidated Rail coming in April 1, and those records were held. Whether there are other records available, I have no idea.

Q. These records would have to be held until June the 21st or 22nd of 1976?

A. I'm not sure.

Q. If they were destroyed, they were destroyed after this past

June?

A. No. From the date, as I understand it, as it was explained to me, for example, from June 1971, after a five year period they can discard those records.

Q. That would make it June 1976, that is what I'm asking you.

A. Yes, right.

Q. Now, right off the top here, Mr. Burchard, referring to Plaintiff's Exhibit 38(a), marked for identification -- I don't know whether they were received or not -- where was that engine inspected at, according to this record dated January 30, 1971?

A. It shows Conneaut, Ohio.

Q. Conneaut, Ohio. That is not a Buffalo location, is it?

A. No.

Q. How about this one on 2/20/71?

A. It shows Belleview.

Q. Is that in Ohio?

A. Yes.

Q. That is not in Buffalo either, is it?

A. No.

Q. Will you go through there and tell me how many are actually in Buffalo?

A. Eight that are legible.

Q. And there's about sixty reports in that exhibit, fifteen, sixteen?

A. Seventeen.

Q. Seventeen, eight out of seventeen. Do you have any idea how these Conneaut and Belleview reports got into the Buffalo Office?

A. It was explained to me that the possibility of those that are shown other than Buffalo, that engine may have ran through the Buffalo terminal.

Q. You don't know this of your own knowledge?

A. No, that is what I was told.

Q. And as far as -- before making repairs or after making repairs, do you know whether they have to give an estimate, the shop has to give an estimate of the cost of the repairs?

A. No, I don't know what procedure they go through.

Q. You don't know whether they keep records of that nature?

A. No.

Q. You were a claim agent in October of 1975, weren't you?

A. Yes.

Q. Do you remember the claim of Harold Parker for the very same engine, N&W 2500?

A. No.

MR. GRIFFIN: I object, if the Court please.

BY MR. COLLINS, SR.:

Q. All I want to know, do you know which law firm in Buffalo handled the Parker claim?

MR. GRIFFIN: I object.

MR. COLLINS, SR.: I think Mr. Griffin said he never handled any Norfolk & Western case. We have an indication that it was a law firm in the Erie County Savings Bank Building --

MR. GRIFFIN: I object.

THE COURT: We don't care.

MR. GRIFFIN: I told Mr. Collins --

MR. COLLINS, SR.: He is claiming surprise.

THE COURT: Please, Mr. Collins.

MR. COLLINS, SR.: You can answer now.

THE COURT: What, you can answer and then what?

MR. COLLINS, SR.: Then I can ask him a couple more things.

THE COURT: No, finish your cross examination.

MR. COLLINS, SR.: All right, you may ask.

REDIRECT EXAMINATION BY MR. GRIFFIN:

Q. Just two matters, Mr. Burchard. Mr. Collins asked you something about procedure relative to the destruction of records, and I believe you indicated that someone told you that it was permissible to destroy such records after five years, is that right?

A. Yes.

Q. You don't know whether that is a law or a policy or a procedure or a custom or --

A. No.

Q. Did you explain that in the Buffalo terminal that no records were destroyed because Consolidated Rail Corporation took over the operation in Buffalo, at least of the Erie Lackawanna, and records were held, is that correct?

A. That is right.

MR. COLLINS, SR.: Your Honor, is Mr. Griffin testifying again? He has a witness here and he is telling about Conrail taking over, when it took over, what they did, and he says, "Am I right."

THE COURT: He is running over unnecessarily what already has been testified to, I will go that far with you, Mr. Collins.

BY MR. GRIFFIN:

Q. You have no knowledge of whether or not any records have been destroyed relative to this locomotive for the year 1971?

A. No.

THE COURT: Anything on that point, Mr. Collins?

RECROSS EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Burchard, in your opinion you could make a more thorough search for repair records, inspection reports, then you did, couldn't you?

A. Well, if you go outside of the confines of Buffalo.

Q. I think you testified that with the limited help you have you had to do it yourself?

A. Here, yes.

Q. And the railroad wouldn't assist you, you had to go out and do this yourself?

A. I did this myself.

Q. If you took more time do you think you could find those, even if you had to go to Conneaut and Hornell, and so forth?

A. I wouldn't go there. The possibility is I would have written.

Q. Do you think you might be so fortunate that they would reply and answer our subpoena?

MR. GRIFFIN: Your Honor, I think this is improper.

THE COURT: Yes. Step down, Mr. Burchard.

(Witness excused.)

THE COURT: We have come to a lot of the essence of the problem, Mr. Collins, when we refer to the time factor. The subpoena duces tecum was dated last Friday, the 1st, and, if I understand, served on Mr. Griffin on that same day, very untimely and on short notice, when you consider the fact that this trial

had been set for October 5 since August 23, 1976 and, consequently, if there had been any dilemma in the totality or lack of totality of the response, I think it may be blameable upon that short notice, rather than anything else. Beyond that, while it may well be possible that there are inspection reports for Engine 2500 that might be in Conneaut or someplace else, or Hornell, I don't really see any such would be probative. We know that the engine was here. We are fortunate enough to have for the jury's consideration the inspection report of this shift practically immediately before Mr. Eggert's shift of June 21 and June 22, 1971, which is perhaps the most probative piece of paper that we would have, and also there is some inference to be drawn from the fact that eight out of seventeen of the inspection reports that are comprised in Exhibit 38(a) are from Buffalo, and the others are from outside of Buffalo. Now, there is a strong implication there, as far as I am concerned, that the great percentage of all the whole routine or all the terminal

of Norfolk & Western might well have found their way into these twenve boxes here in the Norfolk & Western yard. At least, we know we have culled -- not only have we culled those that were made here, the Buffalo inspection reports, but we have caught up with Belleview and Conneaut and seven others from outside Buffalo for that first period of 1971, pre-accident. Consequently, I am satisfied with the production of the defendants in the case, although it might be well to warn defendants in the future that if they are hit with something they can't comply with, they might seek relief or make any other objection they properly can, or ought to to protect their situation.

MR. COLLINS, SR.: Let me say, your Honor, as far as your comments on the briefness of our serving the subpoenas, there is no rigid and fast rule in this court as to when you get down for trial. We were second out following a criminal case that was to precede us, and I didn't know that until last Friday when we served our subpoenas. We served a

gentleman that said he could take for the N&W and Erie Lackawanna, and we advanced $40. I admit we probably didn't give him travel expenses, but if you take him as one employee, and we give the twenty, you could add the other twenty for travel expenses. We served one employee, and then we came to court, and -- there was a weekend, Saturday, the railroad works on Saturday, Mr. Burchard didn't get over there until Monday, and he said finally on Wednesday he went to the Bison Yard. That was plenty of time to start these things. He said he is lucky if he gets any response to them.

THE COURT: No, he said he was lucky to get that quick a response on the wage and earnings reports from the Accounting Department in Cleveland.

MR. COLLINS, SR.: He was fortunate to get them.

THE COURT: That quickly.

MR. COLLINS, JR.: Under the circumstances, your Honor, the plaintiff is going to make a motion at this time that we exclude all inspection reports from evidence. The railroad says they can't find any other ones, they have made a search, but here they come up with three reports;

one on 6/23; one on 6/22 and one on 6/21, they just happened to be the three days involved with this accident. If the railroad says --

THE COURT: Is that Defendant's Exhibit 5? No, that is March 6th --

MR. COLLINS, JR.: Defendant's Exhibit 3, your Honor, the inspection report dated 6/21/71; Defendant's Exhibit 4, 6/22/71, and the other not marked is 6/23/71. It seems more than coincidental under the circumstances that the railroad can't find anything for June, May or April, but they do have three reports for the day before, the day after and the following day after the accident.

THE COURT: Which is the one for the 22nd, is that Defendant's Exhibit 4?

MR. COLLINS, JR: Defendant's Exhibit 4 in evidence, your Honor.

THE COURT: The other one hasn't been marked?

MR. COLLINS, SR.: It hasn't, your Honor.

THE COURT: Let's mark that, just to get it in the record, as Defendant's Exhibit 6.

(Thereupon report referred to was marked

Defendant's Exhibit 6 for identification.)

THE COURT: That is for June 23, 1971?

MR. COLLINS, JR.: I beg your pardon?

THE COURT: Is that for June 23, 1971?

MR. COLLINS, JR.: Yes, it is, your Honor. In support of our request, I would point out to the Court that there are certain other reports, dated 3/9/71; 3/7/71 and 3/6/71, which indeed indicate a defect to the same engine, to the seat, and Mr. Griffin offered yesterday an accident report, a telegraphic report and another company report, concerning this accident, but there was no mention of a seat, a defective seat, and Mr. Griffin said, 'I didn't handle the case.' His partner handled the case, and I talked to the railroad men last night, and they knew the seat was defective, they knew it was broken, yet it is on none of their reports. They come into court with three reports on the 2500 that just happen to be the date before, the day after, and the following day of the accident. I think it is highly prejudicial. I think the evidence is very

suspect at this time, and we will move the Court that he exclude the three offers Mr. Griffin made, because Mr. Griffin can't come forward with any requests that we have made.

THE COURT: I had mentioned that the defendants, themselves, ought to have been more on the ball, to use a colloquialism, in regard to the subpoena duces tecum. I think also this is true as to the plaintiff. Now, you issued the subpoena -- I don't know exactly when you first found what reports you were going to get, I gather from yesterday's performance that you were still extracting them from Mr. Griffin, but on Tuesday, the 5th, I would think you would have found out from Mr. Griffin what he had pursuant to your subpoena duces tecum. Of course, he would have told you that Mr. Burchard was still searching, as Mr. Burchard said he searched, on the afternoon of Tuesday, the 5th, and the afternoon of Wednesday, the 6th, for these documents. I suppose that would have been his response. Maybe I am drawing too close a line on you, but I

have in mind that you are the ones who have come up with the ICC requirement of the daily inspection report, and from that it should be known that there ought to have been a great mass of these inspection reports, some two hundred fifty or three hundred at least, probably for a year, depending on the times when the engine is down and there wouldn't be any inspection reports. I don't know, I think both sides probably can be criticized; plaintiff mainly for the late service of the subpoena duces tecum, and the railroad for its informal approach to it, and its lack of thoroughness in following through on this legitimate demand or complaining about the illegitimacy of the demand or the duress, hardship or harrassment, and plaintiff perhaps giving some indication that there should have been reports for everyday.

MR. COLLINS, JR.: The railroad knows as a matter of la that they have to keep them in their terminal. It is not a burden on the plaintiff to tell the railrond, 'You've got to keep your reports.'

THE COURT: No, what I am pointing is out that it seems to me plaintiff's eyes were not closed --

MR. COLLINS, JR.: Your Honor --

THE COURT: -- to the volume of documents or material that ought to have been available and --

MR. COLLINS, JR.: Your Honor, we relied on the code, which says they must keep them in their terminal.

THE COURT: They seem to have been kept in the terminal. I am satisfied that we have all the inspection reports that were made and kept here in Buffalo. There seems to be a great gap between what were made out and the requirements of the regulations. It would be apparent to me that the railroad wasn't making out an inspection report for Engine 2500 for everyday that it was in service.

MR. COLLINS, JR.: Your Honor, under the circumstances, we did have a discussion about continuing next Wednesday, but we would move that the Court grant an adjournment until Wednesday in order that the railroad can check the Hornell shops where the major repairs are done to the engines. That is only ninety miles from here. I don't think under the circumstances that it would be --

Discussion.

THE COURT: We are not talking about a major repair here, I think you will admit that, Mr. Collins.

MR. COLLINS, JR.: We don't know what type of repair they had to make to this. I know, your Honor -- and you can put Mr. Burchard on the stand -- they didn't make many repairs in Buffalo, everything was sent to Hornell.

MR. GRIFFIN: Your Honor, this a Norfolk & Western engine, they never send a Norfolk & Western engine to Hornell, that is the Erie Lackawanna.

MR. COLLINS, JR.: We request that the repairs from the N&W then. It is a matter of fairness to the plaintiff. It seems more than coincidental that the only three reports we have deal with the three days of the accident. The defendants' evidence at this point is highly suspect.

MR. COLLINS, SR.: Your Honor, it is like our subpoenaing in the hospital records and they send somebody over and he takes out three sheets and says that is all there is that is material. We have a right to look at the entire record.

THE COURT: Let me see 35 and 36, the two subpoenas.

MR. COLLINS, JR.: Yes, your Honor.

THE COURT: You call for inspection reports, which we have been dealing with, and repair reports which we have seen nothing of, is that right?

MR. COLLINS, SR.: That is right.

THE COURT: What is a work report?

MR. COLLINS, JR.: A work report, as I understand it, is a report that the people who fix the engines would also make because they estimate the amount the repair would cost and the type of repair.

THE COURT: That is separate from a repair report?

MR. COLLINS, JR.: I'm not sure, your Honor, the railroad would be able to inform us of it.

THE COURT: I am looking at your subpoena, and I am wondering -- I know, of course, you are not without knowledge of the operations of railroads -- we know there are inspection reports, we have seen those, we have talked of repair reports, and I don't know if there are something separate that would be work reports or whether that is a general characterization of a report concerning repairs. When you say "repair or work reports," it seems to me it is one type of report that you are

talking about.

MR. COLLINS, JR.: They make a report and they indicate the amount, the cost, the hours, they figure it out for the Accounting Department, which is the work report we are talking about. They have to get an approval to fix this. This type of report is kept by the railroad also. If your Honor will exclude what defendant purports to be inspection reports of 6/21, 6/22 and 6/23, then the plaintiff is prepared to go on with the trial.

MR. GRIFFIN: Your Honor, may I be heard further?

THE COURT: Yes.

MR. GRIFFIN: Two of them are already in evidence.

MR. COLLINS, JR.: Under the circumstances, your Honor --

THE COURT: I've got this in front of the jury already.

MR. COLLINS, JR.: You can direct the jury not to consider them, and withdraw them. Under the circumstances which have come out in the courtroom, they are highly suspect. We know by law they have to keep one everyday. We know that the only three they have are the three concerning the day of the accident, the other three they have show left front seat missing, replaced front seat, replaced

front seat, and they have indicated that the work was done because they signed their names to them. The work wasn't done, it is chronological. We have a lawyer from Mr. Griffin's firm who defended that case, who knows the seat wasn't repaired, who knows the plaintiff claimed it, and Mr. Griffin says, 'Here is a telegraphic report of the accident, here is the OD-4, there is nothing on there about the broken seat.' We could bring Mr. Parker in here or probably subpoena Mr. Corky LaVallee, and he would tell the Court what was going on. This type of evidence is suspect, and the Court I don't think should be a part of it. It is prejudicial to the plaintiff.

MR. GRIFFIN: Your Honor, can I stand here and refute these suggestions? Now, we have searched the records for these engineers' and regular course of business inspection reports. We have gone out there, and we have brought them all in. We have explained that everything that was in the Buffalo terminal that was interpreted under this has been brought before the Court, the engineers' and the

Discussion.

regular inspection reports after each tour of duty. Now, Mr. Burchard went out there, and he went through every box, and he said those records could well have been gone, except that Conrail Corporation decided to keep all of the records. We brought all those in. Now, some of those show that a particular inspection may have been made at another location. However, when Mr. Collins read the report and the regulation, many of these things must go with the locomotive. Whether the locomotive arrives at a terminal and they take it off or didn't take it off at the last terminal, we don't know. Now, to draw the inference that these are the only reports for the year that are in existence is not a proper inference. Obviously, the inference is that the engine was around in Buffalo on the dates that Parker was on the engine because that shows he was in Buffalo back in March. Obviously, when this particular plaintiff was on the locomotive it was in Buffalo. Now, it has obviously not been in Buffalo for ages. These reports were given to Mr. Collins on Wednesday, they

were available on Wednesday --

THE COURT: Given to him or available to him?

MR. GRIFFIN: Given to him, turned over to him, he had them Wednesday. At the close of Wednesday I said, "Have you got those work reports --

THE COURT: Work reports?

MR. GRIFFIN: I said, "The reports that I gave you."

THE COURT: Inspection reports.

MR. GRIFFIN: Yes, whatever I gave him. He never said to me, 'You didn't bring in work reports.' Here is what we've got relative to that business, this says signature of workman, and I don't know whether there is any other report that a workman makes other than this. It may be that there is some consolidated type of report that shows all of the work that a man did in a day. Whether it identifies it by engine, we don't know. Mr. Burchard said he embraced everything in the Mechanical Department office and brought it in. These were turned over to Mr. Collins and in his possession Wednesday. At four o'clock when we left I said, "Can I see those, can I have those back?" He said, "I would like to have them left with the Court." I said,

Discussion.

"Okay," and they were left here Wednesday night. I don't know whether Mr. Collins took them with him or whether they were left in court, but I left them on the table Wednesday. At no time did they say, 'You've gotta search the other terminals,' and so forth. Now, we are here, they are trying on a technical basis to make -- I admit we didn't search all the terminals, I admit we could be under a duty under subpoena to go to every part of the railroad, this Court can order us, but I think we've got to have a reasonable time. If they wanted us to do that, if their understanding was that we should go to every part of the Norfolk & Western Railroad and every part of the Erie Lackawanna Railroad and find these records, then isn't it fair to tell us? They know there has been a transition in service. I am not seeking to relieve us of an obligation but they should tell us. They could of at least brought it to the attention of the Court on Wednesday when they had these, and said, 'Your Honor, look, this is a minescule production, where are the rest of the records?'

The Court could have said, 'Griffin, get on the phone to these people and see if there's records in Conneaut, in Marion, in all the other terminals throughout the many stations of the Norfolk & Western Railroad.' That would take them time, but we would have cooperated and put people to work. Yesterday I went out to the railroad on the thing. Now, for five years this case has been pending and no other lawyer served a subpoena or requested these records. We brought in ourselves the records around the date, that is what we are interested in. We don't give a darn for month after month before or after this accident. Naturally, we embraced to ourselves, get it before and after, and all that we have in Buffalo were embraced and brought here, that is what has been furnished.

THE COURT: Mr. Collins says that they may be two different things, everything here is one thing, what you are interested in would be a lesser thing.

MR. GRIFFIN: Sure.

THE COURT: What about the totality?

MR. GRIFFIN: We have given the totality that is here in

Buffalo, your Honor.

THE COURT: All right.

MR. GRIFFIN: Now, if they are elsewhere --

THE COURT: You are saying what you were interested in happened to be the same thing as everything that was there?

MR. GRIFFIN: No. As I prepared this case I was only interested in the approximate dates, and then the subpoena came and we had to go six months after the accident, and we had to sweep in the full six months before the accident.

THE COURT: And only found the Parker reports for the Erie Lackawanna, the Parker accident reports? I mean the ones that were around that time.

MR. GRIFFIN: There were four, that is right. Your Honor, if it wasn't for the fact that they also put in their subpoena Parker, we went into the Parker file and found some of these originals that were in March.

THE COURT: In your office?

MR. GRIFFIN: No.

THE COURT: Where?

MR. GRIFFIN: Out at 1221 Clinton Street.

THE COURT: In the claim file?

MR. GRIFFIN: Yes. They wouldn't have had Parker in the

normal search, but I said let's look, because what they apparently did, they took the March ones back in when the Parker case come up and stuck them in the file at 1221 Clinton.

THE COURT: Did Mr. Burchard do that, did he find these? He had the Parker file I imagine?

MR. GRIFFIN: He had the file in his office relating to Parker. Let me explain what happened, your Honor. Here I know what happened. When Burchard brought me the batch I said, "I don't see anything of the Erie Lackawanna's for March." I said, 'I know Mr. Collins claims that Parker was in an engine, so look in the Parker file,' relative to whether any inspection reports -- these regular course inspection reports -- were in the Parker file. We found some in the Parker file.

THE COURT: You didn't say, 'We don't have anything for May?' You didn't say to him, 'We don't have any reports for May or April or --

MR. GRIFFIN: No.

THE COURT: Or February?'

MR. GRIFFIN: I think there are some miscellaneous. I didn't, I didn't question him in that respect.

Perhaps one should have said -- I was not conscious of this daily requirement -- and perhaps I should have said, 'There must be many, many more of these, and the reason you don't have them is because they must be in other locations on the railroad.' I never said that. I don't think there is much question that if a full search were made on the railroad you probably could come up with many more of these.

THE COURT: You mean other terminals?

MR. GRIFFIN: Yes.

THE COURT: I am talking about your search here. Mr. Burchard said he went through the twelve monthly boxes, and he said on the stand that in those boxes were N&W inspection reports and Erie Lackawanna inspection reports, I gathered comingled, is that right, Mr. Burchard?

MR. BURCHARD: Yes, your Honor.

THE COURT: You found any inspection report that related to 2500, whether Erie Lackawanna or N&W, were in a common box?

MR. BURCHARD: Yes, sir.

MR. GRIFFIN: You have to understand that is the office

that served the joint facility here, the Bison Yard. They put the records, both Norfolk & Western and Erie Lackawanna, all together. If you went down to Hornell, for example, you wouldn't find, I wouldn't think, Norfolk & Western records.

THE COURT: It is a high coincidence that all we have on the Erie Lackawanna inspection reports are four that dealt with the Parker incident and were in the Parker file. Then three others that come out, which are the three days right around this particular event, and no others. Nothing in August, nothing in April, nothing in February, nothing in November.

MR. GRIFFIN: Your Honor, there is no evidence that the engine was used by other people on the Erie Lackawanna during that period of time. All I can say --

THE COURT: The two times Erie Lackawanna gets the engine there is an accident.

MR. GRIFFIN: That may be a coincidence. You know, that just may be so.

MR. COLLINS, JR.: If the Court would let us bring in witnesses, I will bring in the people that worked on

the engine on the 1st of June and the 2nd of June. The Court hit the nail on the head, it is quite a coincidence that the only three we have for June are the three around the accident. The only three for March are the three around the accident. Parker told me he worked that N&W engine for over a week in Black Rock.

THE COURT: That is back in March?

MR. COLLINS, JR.: Right.

THE COURT: We have four reports for March, I'm not worried about that.

MR. COLLINS, JR.: That is it in a nut shell what you said, and you can see the unfair prejudice to the plaintiff to put in the three reports for the day of the accident, and then they say, 'We have no more to produce.'

THE COURT: It might have some probity if you have some testimony that would show somebody working for Erie Lackawanna was running Engine 2500 in early June or during May, but --

MR. GRIFFIN: Your Honor, you know you've got it, you've got this witness saying that on the 19th, two days before he operated this engine, it shows in his book, but he didn't make

out a report.

THE COURT: He seemed not to make out reports.

MR. GRIFFIN: There is an explanation for not having one on that date. Now, if this witness got on the stand and he said, 'My book shows that I did it on the 19th, and I turned in a report,' and there wasn't any such report, I would be suspect.

THE COURT: That is right.

MR. GRIFFIN: But there is not a bit to justify that. I say that the only inference that you can draw under the state of the proof here is that the engine was not being used by Erie Lackawanna engineers on any other days in the Buffalo terminal where they turned in reports, and I honestly think this is just -- is very easy when you have a big corporation, five years, when you have many changes in management on the railroad where equipment goes all around to try to embarrass us. I stand before this Court and I say that I did not instruct the person that I deal with on the railroad when I first learned of this subpoena on Monday to go --

THE COURT: You learned of it Monday?

Discussion.

MR. GRIFFIN: I learned of it Monday. I got a phone call on Monday morning that subpoenas had been served. Mr. Burchard was in my office sometime Monday with the subpoena, to go over the various things. He asked my direction. As I told the Court, they put many things in the subpoenas that we don't produce. We don't produce material prepared for litigation, we don't produce statements, and we don't produce other things where the claim agent is out there and has somebody look at something with him and expresses his ideas, we don't produce that, but the things in the regular course we produce, and I say to the Court that I didn't tell Mr. Burchard to go throughout the railroad and when he brought in the batch of twenty or twenty five, I didn't say, 'How come how few, there must be more throughout other departments in the railroad,' and instruct him to go --

THE COURT: Who served these, 35 and 36?

MR. COLLINS, SR.: Our office did, we make the affidavit.

MR. COLLINS, JR.: They were served on the superintendent of the railroad.

THE COURT: No return on them, right?

MR. GRIFFIN: They are invalid, I could stand here and move to vacate them.

THE COURT: No return on them.

MR. COLLINS, SR.: The affidavit? I will have it put on, your Honor.

THE COURT: We don't want to jockey them around at this point. I am looking at them as they are.

MR. COLLINS, SR.: They admit the service, your Honor.

MR. GRIFFIN: I do not admit the service. They are void subpoenas, there was no proper person served. But I did not raise that. I don't waive that, but I haven't raised it, I am trying to cooperate. We have this in every case.

MR. COLLINS, JR.: Your Honor, they have a new superintendent out there who was served.

MR. GRIFFIN: There is no employee of the Erie Lackawanna Railroad in this city at the present moment.

THE COURT: There is nothing on 35 and 36 that shows service. In fact, they were received, we know, by Mr. Burchard on mid-morning on the 4th.

MR. COLLINS, SR.: Might I ask Mr. Burchard who received those?

MR. BURCHARD: Who received those subpoenas?

MR. COLLINS, SR.: Yes.

Discussion.

MR. BURCHARD: I don't know who received them at Bison Yard. I had to go over Monday and pick them up.

MR. COLLINS, SR.: From whom?

MR. BURCHARD: The secretary.

MR. COLLINS, SR.: To whom?

MR. BURCHARD: Superintendent's Office.

MR. COLLINS, JR.: Your Honor, you understand the Bison Yard is now being run by the N&W, it is a joint operation.

THE COURT: All right.

MR. COLLINS, JR.: Your Honor, you know, to have Mr. Griffin come here and ask this Court for some type of leniency because they don't have records -- he is in here saying, 'We keep these things in the normal course of our business.' He says, 'We can't find any of them except the three.' To me, that is suspect. I ask the Court in the interest of fairness to the plaintiff, if those records -- if he can't produce any more records, that all the records be excluded.

THE COURT: You can make whatever use of it you want by way of argument. All right, where are we in the testimony?

MR. GRIFFIN: I have Dr. Militello scheduled at eleven o'clock. I have a few more questions to conclude my cross examination of the plaintiff.

THE COURT: All right, let's do that. Get the jury up.

(Thereupon the jury entered the courtroom at 10:48 A.M.)

MR. GRIFFIN: I forgot to premark some exhibits that we will be using with the witness at eleven o'clock.

(Thereupon Defendant's Exhibits 7 through 9 were marked for identification.)

THE COURT: Ladies and gentlemen, belatedly we are ready to get underway. Mr. Eggert?

T H O M A S W I L L I A M E G G E R T, called as a witness in his own behalf, and having been previously duly sworn, resumed and testified further as follows:

CROSS EXAMINATION BY MR. GRIFFIN (Cont'd.):

Q. Mr. Eggert, is it your testimony that you first sat in the front seat of this locomotive, N&W 2500, on the night-morning

of your claimed accident sometime around ten thirty in the evening?

A. Yes.

Q. And you said the accident happened around two thirty the following morning?

A. Approximately, yes.

Q. Now, during the course of these hours that past from ten thirty until the time you said you hurt your knee, did you have occasion to get up and go to the rear seat?

MR. COLLINS, SR.: I object to the repetition. He asked the same questions before, he is going over it again.

THE COURT: He didn't ask that question. Overruled.

BY MR. GRIFFIN:

Q. Did you have occasion to go to the rear seat at any time?

A. No.

Q. Did you have occasion to stand up in the locomotive to stretch your legs?

A. No.

Q. Did you have occasion at any time to get up and leave the locomotive for any personal purposes?

A. No.

Q. Did you have occasion to turn around and engage in any sort of conversation with your engineer?

A. No.

Q. Is it your testimony that from ten thirty, when you first took up the occupancy of the seat, until two thirty in the morning you stayed in the same position all the time?

A. Yes.

Q. And at no time up to two thirty in the morning was there any contact between your left knee or any part of it --

THE COURT: This is repetitious. You have gone over that.

MR. GRIFFIN: All right, if the Court rules that I have, I have no further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Eggert, following your accident you said you made a report to a terminal trainmaster by the name of Reich?

A. Yes, I did.

Q. And following that you also had a conversation with a road foreman of engines by the name of Beyer?

A. Yes.

Q. Then following that you had a conversation with a T.J. Wynn, who is Mr. Burchard's predecessor as a claim agent?

A. Yes.

Q. All right. And --

MR. GRIFFIN: Your Honor, if I was repetitious, I suggest this is more than repetitious.

THE COURT: It is. It is no part -- well, it is slightly part of the cross examination, but I assume we will get somewhere on it.

BY MR. COLLINS, SR.:

Q. Mr. Griffin asked you about your hiring attorneys by the name of Weber & Weston, is that true?

A. Yes.

Q. Which one of those attorneys did you go to see, Mr. Weber or Mr. Weston?

A. Mr. Weston.

Q. Eventually did he give your claim to somebody to handle in their office?

A. Their associate, yes.

Q. What was his name?

A. Lambert Haley.

Q. Could you give me an approximation of his age, and so forth?

MR. GRIFFIN: If the Court please --

MR. COLLINS, SR.: Mr. Griffin opened the door.

THE COURT: He is forty five or fifty years of age, I know that, if it matters.

BY MR. COLLINS, SR.:

Q. To your knowledge, did he have any experience with railroad law?

A. No, not to my knowledge.

Q. All right. Eventually you left that law firm?

A. Yes, I did.

Q. I think Mr. Griffin asked you if you went to Homer Peters a railroad attorney out of Albany, New York?

A. Yes, I talked with Homer Peters.

Q. Did you retain him?

A. No, I did not.

Q. Why was that?

A. We talked about the case, and I didn't retain him because of money.

Q. All right. Then you went to another attorney by the name of Gerard Lankes?

A. Yes, sir.

Q. Known as Jerry Lankes?

A. Yes.

Q. And was Mr. Lankes a railroad attorney, to your knowledge?

A. Yes.

Q. Did he handle your case?

A. He did not personally.

Q. To whom did he give it?

A. Mike Semple. Michael Semple.

Q. Is he a young attorney?

A. Yes, he is.

Q. Experienced in railroads, to your knowledge?

A. I don't believe so.

MR. GRIFFIN: Your Honor, the deposition was conducted

with Mr. Lankes interrogating the railroad employees, it is right in the records of this court.

THE COURT: You may ask about that later.

BY MR. COLLINS, SR.:

Q. Mr. Lankes handled part of the case, is that right, then he gave it to Mr. Semple?

A. Yes.

Q. Now, I think we got into the question of the engine going out onto the city main, do you know whether that track is classified as a main track?

A. Yes, it is.

Q. And when it leaves the Bison Yard and runs in a westerly direction, where does it go?

A. It would go to that they call Pennsylvania Junction, and onward to Abbott Road.

Q. The trackage between those two yards, is that classified main track?

A. Yes, it is.

MR. GRIFFIN: Objection, if the Court please, this is --

THE COURT: No part of the cross examination, sustained.

BY MR. COLLINS, SR.:

Q. You had operated an engine for a number of years, was there any practice that you had when you had a heavy train or lots of cars, as far as the use of air?

MR. GRIFFIN: I object, if the Court please, outside the scope.

MR. COLLINS, SR.: That is what you brought in, your Honor?

THE COURT: No, I didn't bring it in. I put it into the case, the fact there was no air in the other cars. He testified to that already, it was not brought up on cross examination.

BY MR. COLLINS, SR.:

Q. You heard his Honor's retort that there wasn't air in any of the cars --

MR. GRIFFIN: I object.

THE COURT: Mr. Eggert testified on his direct examination that there was not any air in any of the other twenty cars. Mr. Griffin did not go into that on cross examination. You are on redirect, which is a follow up on cross examination, it is limited to subjects that are covered in the cross examination.

MR. COLLINS, SR.: I thought Mr. Griffin had, your Honor.

THE COURT: No, he hadn't.

MR. COLLINS, SR.: All right, I think that is all.

MR. GRIFFIN: I have no further questions.

THE COURT: All right. Thank you, Mr. Eggert.

(Witness excused.)

Discussion.

MR. COLLINS, SR.: As I understand it, your Honor, your ruling has been that our witnesses are excluded, any other witnesses that we want to produce that we have discussed --

THE COURT: Yes, I would permit testimony along the lines of 1-A in your amended pretrial statement, as long as it is particular knowledge, and not just some general knowledge, and if witness number one is a proper expert, I would permit him to testify properly along the lines of 1-C, and if witness number two be an expert, he may testify, and that would be the remainder I would allow under what you have noted in your amended pretrial statement.

MR. COLLINS, SR.: Your Honor, I would like the Court to take judicial notice that according to the life expectancy tables --

THE COURT: Yes, I will take notice of the life expectancy. I will instruct the jury accordingly. I will tell you prior to your closing what life expectancy figure I will use. I will take judicial notice. Is it only the life expectancy tables you want? Do you also want the work expectancy tables also?

Discussion.

MR. COLLINS, SR.: Yes, your Honor. The only thing I want to offer is the certififed copy of the hospital records of the Mercy Hospital. I will find that in a minute. I think it is marked Plaintiff's Exhibit 27, your Honor.

THE COURT: I have 27 without knowing what it is. Those are the Mercy Hospital records?

MR. COLLINS, SR.: Yes. Certification by the assistant director, sworn to before Sister Mary Kennedy.

THE COURT: Do you have any objection if they are offered within permissible bounds?

MR. GRIFFIN: No, your Honor.

THE COURT: For normal purposes?

MR. GRIFFIN: No, your Honor.

THE COURT: All right, they are received.

(Thereupon Plaintiff's Exhibit 27, previously marked for identification, was received and marked in evidence.)

THE COURT: They may be referred to by counsel. There are certain second hand knowledge, information and matters set forth in the hospital records, and you will find I won't be sending the hospital records to the jury room with

you, but either attorney can refer to it and read to you certain items from it as each wants to.

MR. COLLINS, SR.: Other than the one witness that you have referred to as the witness that we set forth in --

THE COURT: Was that number one?

MR. COLLINS, SR.: -- 1-A and C, the plaintiff will rest with that exception, we are calling him.

THE COURT: You will have him available this afternoon?

MR. COLLINS, SR.: Yes, your Honor.

THE COURT: You have a witness coming in at eleven, do you have any other evidence?

MR. GRIFFIN: I have Dr. Militello scheduled for eleven, and I have another five minute witness to merely identify the exhibit.

THE COURT: Are you ready with him now?

MR. GRIFFIN: No.

THE COURT: He is coming down?

MR. GRIFFIN: Yes, he has to be brought.

THE COURT: I see. You have no one here at the moment?

MR. GRIFFIN: No, the plaintiff hasn't rested.

THE COURT: He has rested except for 1-A and 1-C.

MR. GRIFFIN: That we will have to take up with the Court. As I say, he still hasn't rested.

THE COURT: I understand. You will be putting on Dr. Militello though in advance of his resting?

MR. GRIFFIN: Yes, because he was scheduled. I spoke to him last night and he said he would be here at eleven o'clock.

THE COURT: Yes.

MR. GRIFFIN: He is here now. Dr. Militello is here, your Honor, may I proceed?

THE COURT: Yes.

(Thereupon Dr. Samuel Militello, 3435 Bailey Avenue, Buffalo, New York, testified on behalf of the defendants. This testimony was not transcribed pursuant to the directions of plaintiff's counsel.)

MR. GRIFFIN: Your Honor, I would apply for leave just to put Mr. Eggert on the stand for one question before the noon recess.

THE COURT: All right. Mr. Collins?

(Thereupon an off the record discussion ensued at the sidebar.)

THE COURT: Mr. Eggert, would you resume the stand, please?

Mr. Walsh, swear the witness.

THOMAS WILLIAM EGGERT, 25-A Garden Village Drive, Cheektowaga, New York, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRIFFIN:

Q. Mr. Eggert, you recognize, do you not, Exhibit 7 as being the records of Dr. Carfagna concerning your care and treatment over the years?

MR. COLLINS, SR.: Your Honor, I think that is an impossibility.

THE COURT: If he doesn't know he can say so. Please sit down, the witness can take care of himself without coaching.

MR. COLLINS, SR.: I am not coaching.

THE COURT: Sit down.

THE WITNESS: Will you repeat the question.

MR. GRIFFIN: Will you read the question, Mr. Noel?

(Thereupon the last question was read by reporter.)

THE WITNESS: No, I don't know anything about it.

BY MR. GRIFFIN:

Q. Were you not a patient of Dr. Carfagna's?

A. Yes, I was.

Q. You do not recognize Exhibit 7 as Dr. Carfagna's records concerning the visits that you had with him prior to June of 1971, and the complaints that you made relative to your knees, you don't recognize that?

A. I don't know anything about Dr. Carfagna's records.

Q. He was your doctor?

A. Yes, he was.

MR. GRIFFIN: Nothing further.

THE COURT: Any cross examination.

MR. COLLINS, SR.: No cross examination.

THE COURT: All right. Thank you, Mr. Eggert.

(Witness excused.)

THE COURT: We are late in having the noon recess. We will come back at one thirty today. I hope it is not raining out.

(Thereupon the jury exited the courtroom at 12:20 P.M.)

MR. GRIFFIN: May I take up a couple of matters with the Court?

THE COURT: We will take them up at the start of the

afternoon session. I am a little late on something. Whatever there is, we can take up when we get back.

(Thereupon the court was in recess at 12:21 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:40 P.M.

(Jury absent.)

THE COURT: All right. I had shut you off a little bit before recess, Mr. Griffin, indicating anything you had I would take up at this time. Is there anything?

MR. GRIFFIN: Well, your Honor, I understand the plaintiff purposes to call a further witness who they conjured up in the last twenty four hours, relative to a pretrial statement, not a fact witness, who was not present. They had represented that Mr. Kendall would be called and had him here and did not elect to call him.

THE COURT: He is a fact witness on 1-A, I would assume, not as to 1-C.

MR. GRIFFIN: Well, I meant "fact" as was present and had knowledge of the accident. Frankly, in light of the -- well -- I understand they proposed to call Mr. Godwin and ask him questions about switching movements, air and all sorts of things of that nature, and I strongly object to that, your Honor.

I don't think it is in the case, it shouldn't be in the case.

THE COURT: It is now, I let it in.

MR. GRIFFIN: I think on the last minute to come up with somebody like this, when there was no representation in the opening in any respect -- I suppose if they want to clarify some procedures about records, and in light of that difficulty with records, I understand that, and I will have to address each question there, but as far as going into a new theory of when you use air brakes, when you don't use air brakes, when you put air in a train, when you don't, that is an entirely different case, it is not present here, your Honor.

THE COURT: I recognize this interjects a completely new theory and, as I said before a couple of times, certainly any reasonable request you have for accommodation will be paid close attention to. All right, get the jury up.

MR. COLLINS, SR.: May I ask about the medical records? You didn't want the amounts in, and I understand it is in evidence, and --

Discussion.

THE COURT: I didn't want you -- in order words, you are asking him, 'Here's a bill for X dollars, is it fair and reasonable?' Now, after the bill has been declared to be fair and reasonable, then it can be put in evidence and the amount comes in. You were just slightly in advance on the amount.

MR. COLLINS, SR.: I didn't know whether you didn't want me to mention it.

THE COURT: I didn't want you to mention it before we found out whether it was fair and reasonable, which would be the basis for it coming in evidence.

MR. COLLINS, SR.: All right.

THE COURT: Even though I recognize the automaticity of it being fair and reasonable, which I have yet to hear a doctor or anyone else say was not fair and reasonable.

MR. COLLINS, SR.: Your Honor, may I call this to your attention? I think Mr. Griffin intends to put on another witness and --

THE COURT: He may -- I don't know, he said he might -- if he applies to me for some extra time or leave to put on even further witnesses, I think I would view it leniently, but I will

consider it when it comes up. I have allowed you to interject this new theory of liability.

MR. COLLINS, SR.: I just state this, your Honor, for the record, on his pretrial statement, I can't see any further witnesses, at least the one that he mentioned earlier today.

MR. GRIFFIN: Well --

THE COURT: Things have happened that have necessitated some new changes.

MR. GRIFFIN: Exhibit 30 is the accident report. If the Court receives this in evidence, I don't have to call Mr. Reich as to his signature. I will offer to put it in evidence, we will have it in evidence.

THE COURT: I don't know what Mr. Collins' position is.

MR. COLLINS, SR.: I object to that, that is the lawsuit, how the accident happened. We have no right to cross examine if you don't bring in Mr. Reich.

THE COURT: That is right.

(Thereupon the jury entered the courtroom at 1:50 P.M.)

THE COURT: All right, Mr. Collins.

MR. COLLINS, SR.: Mr. Godwin.

R O B E R T W. G O D W I N, 23 Shenandoah Road, Buffalo, New York, called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Godwin, are you an employee of Conrail, formerly Erie Lackawanna Railroad?

A. Yes, I am.

Q. What is your position with that railroad?

A. Locomotive engineer.

Q. And how long have you been employed by the Erie Lackawanna Railroad?

A. Since August 16, 1957.

Q. Were you so employed on June 21 and June 22, 1971?

A. Yes, I was.

Q. Now, are you an associate or a friend of my son, John?

A. Yes, John worked with me on the railroad. He is also a local chairman, I'm a local chairman also.

THE COURT: Local chairman?

THE WITNESS: Local chairman of the railroad organization.

THE COURT: That is the union?

THE WITNESS: Yes.

BY MR. COLLINS, SR.:

Q. John worked there when he went to law school?

A. Yes, sir, he did.

Q. And you are local chairman of what union?

A. Brotherhood of Locomotive Engineers.

Q. John was a local chairman of what?

A. United Transportation Union.

Q. Have you and he had hearings together and things of that nature?

A. Yes, sir, we have.

Q. So you came in here at our request following a subpoena?

A. Yes, I did.

Q. Mr. Godwin, you said that you hired out as a -- was it as a brakeman in 1957?

A. As a fireman.

Q. Excuse me, as a fireman.

A. Right.

Q. And then gradually you worked up and were promoted?

A. Promoted in 1966, set up as an engineer in 1967.

Q. 1967?

A. Yes.

Q. Have you been working as an engineer ever since?

A. Yes, except for once of twice I was set back when business got slow for a month or two.

Q. In the year 1971 were you working as an engineer or had

you been set back to fireman?

A. I was working as an extra board engineer.

Q. On the extra board?

A. Yes.

Q. By the "extra board," is that what we've had described, when you come in you go on the bottom of the list and work up and you're called and go out?

A. Yes.

Q. How long have you worked on the extra board?

A. Since 1967.

Q. And you never had a steady job?

A. No, sir, I haven't.

Q. Always worked the board?

A. Always worked the extra board.

Q. Is that of your own choice?

A. Most of the time I can't hold a job, I don't have enough seniority. I usually stay on the board, yes, sir.

Q. During the time that you worked on the board, have you had occasion to work in the Bison Yard?

A. Yes sir, the preponderance of our yard work is in the Bison Yard.

Q. In the course of -- you have been an engineer how many years?

A. Nine years.

Q. How long have you worked in the Bison Yard?

A. Since -- the entire nine years I have been an engineer I have been in and out of the Bison Yard or around it.

Q. Has the Bison Yard always been the Erie Lackawanna yard?

A. It is a joint facility with the Norfolk & Western, it is our major yard, yes, sir.

Q. And you have worked there at least nine years?

A. Yes.

Q. During the course of your employment as an engineer in the Bison Yard, could you tell us approximately how many times you have worked in the Bison Yard?

A. Well, I would say you work in and out of the Bison Yard four or five times a week, in the Bison Yard about that, four or five times a week.

Q. And over a period of nine years?

A. Oh --

THE COURT: That is just a question of multiplication.

THE WITNESS: I would say on yard jobs in Bison Yard probably fifty -- oh, I don't know -- quite a bit, I wouldn't want to guess. It is quite a bit, most of our jobs start in the Bison Yard.

BY MR. COLLINS, SR.:

Q. Have you worked utility jobs in the Bison Yard?

A. Yes.

Q. Now, as an engineer have you been required to fill out

inspection reports on engines upon completion of your tour of duty?

A. Yes, that's a requirement that we have to do.

Q. You are supposed to do that?

A. Yes.

Q. Now, in your nine years in the Bison Yard have you filled out these inspection reports?

A. Yes, sir, I have.

Q. And showing you, just for the view of it, Defendant's Exhibit 6, is that a type of report that you filled out?

A. Yes, that is it.

Q. In your nine years in the yard, can you tell us how many times you filled out those reports?

A. Yes, I filled them out every time I went off duty if they were available.

Q. Were they always available?

A. At the service track when you go off duty they are always available, but at outlying points, points away from the service track, most of the time they are not available.

Q. How about the Halstead Yard?

A. That is a point away from the service track, they are usually not available there.

Q. Can you give me an approximation of the nine years you have worked at Halstead Yard how many reports you have filled out?

MR. GRIFFIN: Your Honor, I think it is irrevelant to the issues in this case, what happened in the nine years.

THE COURT: Overruled.

THE WITNESS: I would say the majority of the time at Halstead I haven't filled them out because they were not available.

BY MR. COLLINS, SR.:

Q. Have you, as a union official, complained about this situation?

MR. GRIFFIN: If it please the Court, I object to this, this is prejudicial, this isn't a case about reports.

THE COURT: Overruled.

BY MR. COLLINS, SR.:

Q. Have you made complaints?

A. Yes, I have mentioned it to the supervisor in charge.

Q. Whose obligation is it to supply these reports?

A. The supervisor of personnel at the service track, it is their obligation.

Q. Now, as an engineer -- of course, you have worked these utility jobs -- could you tell me what the utility job at Halstead Avenue in the Bison Yard usually does?

A. It switches cars, couples up tracks and swings tracks over to make up trains.

Q. By "swinging over," you take one train and put it onto another?

A. Yes, you double them up, you take several tracks and make up a train.

Q. Are you familiar with the city main?

A. Yes, I am.

Q. Does that run generally east and west?

A. That is an east-west main, yes, sir.

Q. Does it curve in any direction after crossing Halstead Avenue?

A. It curves to the south just past Halstead Avenue.

Q. Halstead Avenue, what is that where it crosses the tracks, is that actually a street?

A. Yes, we have been told --

THE COURT: It has nothing to do with what he has been told.

MR. COLLINS, SR.: It has to do with air across a city street.

THE COURT: All right, go ahead.

THE WITNESS: Yes, sir, we have been told that --

MR. GRIFFIN: I object to that.

THE COURT: Yes, we don't want to know what you were told, we don't care what you have been told.

BY MR. COLLINS, SR.:

Q. Referring to Plaintiff's Exhibit 2 in evidence up here, Mr. Godwin, can you see the diagram?

A. Yes, sir.

Q. Is this the city main up here that you referred to?

A. Yes, sir, it is.

Q. And in which direction does that city main turn after crossing Halstead Avenue?

A. There is a curve to the south side.

Q. That would be the top of the diagram?

A. Yes, sir.

Q. Generally speaking, with N&W engines, do you know of the 2500 series?

A. Yes, sir, I do.

Q. And the short nose on that, is that considered the front or back of the engine?

A. That is considered the front.

Q. And the front section on the N&W engines, at the Halstead Avenue yard, that end of the Bison, which way do they face those?

A. They would be facing west.

Q. Is that the practice of the railroad to face the N&W 2500 series in a westerly direction?

A. Yes, sir, it is.

Q. The short nose would be west and the long nose would be east, is that generally the way they face those engines?

A. Yes, it is.

Q. Now, when swinging these tracks, do you know how many cars

one of say the longer tracks in the Bison Yard will hold?

A. That would hold probably about roughly fifty, fifty-five, sixty cars.

Q. And if you were swinging onto one track, do you have any idea of the maximum number of cars that you would be swinging?

A. It varies, depending on the classification. If the track was full, you would be swinging sixty, sixty-five cars.

Q. When you make the swing, is there any way you can determine whether you use air or not?

MR. GRIFFIN: I object, it is not part of this case.

THE COURT: Overruled.

THE WITNESS: You use your judgment. If you see -- if you can see the makeup of the train or the conductor tells you that you've got some heavy stuff, you are handling heavy stuff, you will request air.

BY MR. COLLINS, SR.:

Q. By "heavy stuff," what do you mean?

A. Steel, grain, heavy loads, coal.

Q. Would that be determined by the engineer and the conductor?

A. Yes, either/or.

Q. What if the fireman were running the engine, would he make that decision?

MR. GRIFFIN: I object to the question, if the Court please.

THE COURT: Overruled.

THE WITNESS: Yes, if the fireman is promoted and qualified, he could make that decision, also.

THE COURT: Would he do that even though the engineer were in the cab with him?

THE WITNESS: I would respect his judgment if he was promoted and qualified.

BY MR. COLLINS, SR.:

Q. What would fashion his judgment, or the engineer's judgment, or anybody's judgment?

MR. GRIFFIN: I object to that type of trying to get into somebody else's mind.

THE COURT: I think we have enough on the criteria.

BY MR. COLLINS, SR.:

Q. Now, Mr. Godwin, would you always use a full train of air or would you be discretionary on it?

A. You would use your judgment. Sometimes two or three cars or air would be enough, sometimes ten cars, sometimes you don't need air.

Q. By "cars," what do you mean?

A. Railroad cars.

Q. In other words, you would put air in the cars that were immediately connected to the engine?

A. Yes, sir,the first three or four. Yes, you would have to do it that way.

Q. How many brake shoes would each car have, to your knowledge?

A. Each car has eight shoes.

Q. So if you use four cars, that would be thirty-two extra brake shoes?

A. Yes.

Q. What effect would that have on slack running in on the engine if you had extra air in these cars that were immediately connected to the engine?

A. The extra air in the cars would allow you to stop faster and, in all probability, smoother.

Q. By "smoother," what do you mean?

A. No slack action.

Q. Stop the slack action from the engine?

A. Yes, sir. It would help absorb the slack action, yes, sir.

Q. All right. Now, when you are pulling a train of cars and you apply the brakes to the engine itself, what is the effect on the cars?

A. As you apply the engine brake the engine slows down, when you are pulling the slack is out, the slack comes in, the slack action comes in against the engine, the slack between the cars bunches up, you have to bunch the cars up to stop them unless you have air.

Q. All right. They would come in, and these cars coming in against the engine, what would that do to the engine?

A. You would receive a -- you would receive a bump, you would

feel a bump of the slack coming in.

MR. COLLINS, SR.: Thank you.

CROSS EXAMINATION BY MR. GRIFFIN:

Q. Well, Mr. Godwin, you have told us that you have been a good friend of Mr. Collins for some time, is that right?

A. I have known John about seven years, yes, sir.

Q. And your two children are here?

A. Yes.

Q. The last time you came in when Mr. Collins called you on short notice, your wife was with you?

A. I was never called by Mr. Collins before, sir.

Q. You were in the courtroom, were you not?

A. I come up and sat and watched one time, yes, sir.

Q. You have been in many hearings with Mr. Collins, haven't you?

A. Railroad hearings, yes, sir.

Q. All right. And under Rule 106 the engineer is in charge of the train, as well as the conductor, is he not?

A. Yes, that is the rule.

Q. And you were not present on June 22, 1971, in connection with any movement that Mr. Eggert's engine was making?

A. No, sir, I was not.

Q. You were not present in October of 1975 when Mr. Eggert testified as to the nature of the movement of the train

here in this courtroom, were you?

A. No, sir, I was not.

MR. GRIFFIN: All right. I don't have any more questions.

MR. COLLINS, SR.: That is all, Mr. Godwin. Thank you.

(Witness excused.)

MR. COLLINS, SR.: The plaintiff rests, your Honor.

MR. GRIFFIN: Rather than make technical motions at this time, I have a fast witness who has been in the other courtroom.

THE COURT: I always like fast witnesses.

MR. GRIFFIN: Hopefully. May I step out to get him?

THE COURT: Yes.

R O B E R T W I L L I A M R E I C H, 159 Princeton Court, Cheektowaga, New York, called as a witness on behalf of defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRIFFIN:

Q. Mr. Reich, have you worked for a number of years for the Erie Lackawanna Railroad?

A. Yes, sir.

Q. And back on June 22nd in the morning hours, early morning hours of June 22, 1971, were you employed by the Erie

Lackawanna?

A. Yes, sir.

Q. What was your job?

A. Terminal trainmaster.

Q. Were you working in the general visinity of the Bison Yard?

A. I was.

Q. And did there come a time that morning when you took an accident report from a Thomas Eggert?

A. Right.

Q. Now, were you a witness in any respect to the accident?

A. No.

Q. Would you have today any memory of anything about that accident?

A. No, sir.

Q. Now, I direct your attention to Exhibit 30, and I will ask you whether you recognize that exhibit?

A. It is a report I made out, it is in my handwriting, my signature is on there.

Q. Is that your original signature, R.W. Reich, TTM?

A. That is right.

Q. Under Item G where the printed form says "Brief details and cause of accident or personal injury," there is some printing in there, is that correct?

A. That is correct.

Q. Where did you obtain that information?

A. From the employee.

Q. And did you put down what he told you?

A. Yes, sir.

Q. And was it the regular course of your business to make such a record?

A. That is correct.

Q. Now, did you make out one report, more than one report or what?

A. One report.

Q. And is there any place on here where Mr. Eggert signed it or was supposed to sign it?

A. No, sir.

MR. GRIFFIN: I will offer Exhibit 30 in evidence.

MR. COLLINS, SR.: Just a couple of preliminary questions, your Honor.

THE COURT: All right.

PRELIMINARY EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Reich, I notice that your report is printed in blue ink, is that right?

A. Yes, sir.

Q. And then there are some other things in here that are written in in longhand, and it is in a different color ink, isn't it?

A. Yes, sir.

Q. Is that your writing?

A. No, sir.

Q. That was put in --

A. After I made the report out.

Q. Do you know who put that in?

A. No, I don't.

Q. To whom did you give the report?

A. Sent it up to the superintendent, Bison Yard.

Q. Did you ever give it to Mr. Wynn?

A. No, sir.

Q. Did you ever talk to Mr. Wynn about this?

A. No, sir.

Q. So then somebody else actually wrote on here in addition to what you put in?

A. That is correct.

MR. COLLINS, SR.: I will have to object to it, your Honor.

THE COURT: Do you want to limit your offer, Mr. Griffin?

MR. GRIFFIN: Let me establish one more thing. I am offering it for a limited purpose.

BY MR. GRIFFIN:

Q. The information that is on Item G as to what the employee said as to how it occurred, the printing of fourteen words, is that in your handwriting?

A. That is correct.

MR. GRIFFIN: All right. Your Honor, I will offer it. I will limit my offer for solely the purpose of the description of what occurred from the plaintiff to this person, as recorded contemporaneously. The rest of the material as it was processed, I don't offer that at all.

THE COURT: All right. Mr. Collins?

MR. COLLINS, SR.: Your Honor, I won't object to it going in for those limited purposes.

THE COURT: All right, I will allow it in. We can read those fourteen words into the record.

MR. GRIFFIN: May I do that now?

THE COURT: Yes.

MR. GRIFFIN: I am reading the printing, "Turning around on seat of Engine 2500 struck left knee on emergency valve lever."

THE COURT: Anything further on direct examination?

MR. GRIFFIN: Nothing more.

THE COURT: Cross examination?

CROSS EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Reich, I won't take long. I believe at the beginning of your testimony you said you can't remember anything about this other than that you made a report, is that right?

A. That is right.

Q. And at that time when you asked Mr. Eggert about how the accident happened, and so forth, you took a brief description, isn't that what you did?

A. That is correct.

Q. It states that these are brief details?

A. Yes.

Q. Just to let somebody know that the accident happened and where it happened, is that about it?

A. That is correct, sir.

Q. Did you inspect this engine after --

A. No, sir.

Q. You did not. You wouldn't know anything about the condition of the seats?

A. No.

Q. Of your own knowledge?

A. That is right.

Q. And you were the terminal trainmaster?

A. Yes.

Q. And did you have to receive these if somebody else made them or is it your duty to go down and make the report out yourself?

A. Generally, you make them out yourself, or the conductor that is in charge, he would make them out if he knew.

Q. Then from there you say it went to the superintendent's

office?

A. The superintendent's office.

Q. And this was made on -- I assume it was made on June 22, 1971 at about 3:30 A.M., it says, "Time and date injury reported."

A. June 22, 1971, that is correct, 3:30 A.M. it was reported.

Q. You rode down there and took it, you made this report so that you would comply with the regulations, isn't that it?

A. That is correct.

Q. It is a telegraphic report of the accident?

A. The report is handed to the superintendent, and it is handled out of his office.

Q. Could I just take a second while I put on my reading glasses, it is kind of small print. They don't use telegraphs any more for sending these notes like it states on the bottom here, do they, to the superintendent?

A. No.

MR. COLLINS, SR.: All right. That is all, Mr. Reich, thank you.

MR. GRIFFIN: Thank you, Mr. Reich.

THE COURT: Thank you, Mr. Reich.

(Witness excused.)

MR. GRIFFIN: He was short. I have nothing further at this time.

THE COURT: All right. Let me talk to the attorneys at sidebar.

(Thereupon an off the record discussion ensued at sidebar.)

THE COURT: It goes without saying, ladies and gentlemen, that we have had some procedural problems and a small degree of reorganization of some aspects of the case as we have proceeded, which resulted in some interruptions to the continuity of the trial and interruptions to the taking of evidence. At this juncture the plaintiff has put in all of his evidence, and it is possible that something further would come in on the defendants' side, and plaintiff may apply to me for an opportunity to put on a rebuttal witness, but we have no indication of that at the moment. Mr. Griffin, representing the railroads, may have one more witness, and I won't know whether he is going to have that witness until I get into Monday. Monday,

of course, is a legal holiday anyway. If he is going to have another witness, he will tell me whether that witness can be here Tuesday morning. Of course, I have my own complications on Tuesday morning because I am going to be tied up Tuesday morning in a matter, and another matter Tuesday afternoon. It may be that if this witness is available Tuesday morning that we would have you back Tuesday morning and get the witness' testimony in and proceed to the summations and the closing arguments and the instructions, and have you take the case and decide it. If he can't come in Tuesday morning or if I am tied up with my other business on Tuesday, it will be Wednesday morning. So, again, I am going to excuse you at this time, and it has not been a day when you have spent much time in the box listening, as a result of the procedural problems and other problems, and I am going to have to again give you this telephone number and have you call in anytime during -- well, Monday after a certain hour.

CLERK: I can go down and put a message on for them.

THE COURT: All right, leave it the same way. If you call this number after five thirty on Monday evening there will be a message there for you, telling you whether to come in Tuesday morning or whether to come in Wednesday morning, and we will proceed accordingly. Again, we have a longer interruption at this time with a three day weekend at least, and it makes more pertinent my admonitions I have given to you before about still keeping your minds open, as far as coming to any decision on the issues in the case, but still remembering the testimony and the evidence that is here, and not talking about the case among yourselves yet, and again, most importantly, not talking with anybody outside of yourselves and, of course, if anyone should try to talk with you, let me know immediately so that I can deal with the matter. You may go at this time.

(Thereupon the jury exited the courtroom at 2:20 P.M.)

Discussion.

THE COURT: Now, for your information, the exhibits that I have in evidence at this point are Plaintiff's Exhibits 1, 2, 3, 9 through 17, 25 through 30, and Defendant's Exhibits 1, 3 and 4.

MR. GRIFFIN: For the record, your Honor, it is my intention to make motions. I won't do it today. The plaintiff has rested, I believe, and I want to make those motions for a directed verdict and for dismissal, of course, to properly protect the record.

THE COURT: Do you want to make them at length?

MR. GRIFFIN: I would suspect, in light of some past history in this case, that perhaps it would not be necessary to make them at great length.

THE COURT: All right.

MR. GRIFFIN: Without in any way indicating the lack of power of the motions, I really wouldn't anticipate much length.

THE COURT: All right. We will take that then at a convenient time. If you are going to put on another witness, we will take it immediately after him, if not, we will take it the first thing Tuesday morning.

Discussion.

MR. GRIFFIN: Thank you.

(Thereupon the court was in recess at 2:23 P.M.)

Transcript of Proceedings, October 13, 1976.

VOLUME V

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT,

Plaintiff,

-vs- CIVIL 73-370

NORFOLK & WESTERN RAILWAY COMPANY, and
ERIE LACKAWANNA RAILWAY COMPANY,

Defendants.

PROCEEDINGS OF OCTOBER 13, 1976

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Transcript of Proceedings, October 13, 1976.

PROCEEDINGS RESUMED, PURSUANT TO ADJOURNMENT, COMMENCING AT 9:25 A.M.

(Jury absent.)

MR. COLLINS, JR.: Your Honor, at this time the plaintiff wants to offer into evidence three records subpoenaed from the defendants; the March 9, March 7, March 6 inspection reports, which I thought were in evidence after the prolonged discussion we had --

MR. GRIFFIN: I understood there was some motion, but they have rested their case, your Honor, and we went over that repeatedly last Friday ad nauseum as to the inspection reports in March of 1971 on this matter.

MR. COLLINS, JR.: It was my assumption that the Court allowed those three in. Mr. Griffin had them in his possession.

THE COURT: You are talking about Defendant's Exhibit 5 and --

MR. COLLINS, JR.: And Plaintiff's Exhibit 33 and 34.

THE COURT: They have been offered, I denied their admission, and I adhere to that position.

MR. COLLINS, JR.: Your Honor, for the record, we will take an

exception, and cite Rule 106 of the Federal Rules. At this time we are making a motion to -- I have papers for the Court -- a motion in limine, and the motion is to exclude any testimony or evidence that the defendant intends to offer at this time from a Dr. Carfagna, who had treated plaintiff, and the motion is based on three grounds; first that the defendant failed to indicate that Dr. Carfagna or his office or records were going to be used in this trial --

THE COURT: You say that in the face of the colloquy we had between your father and Mr. Griffin as to the stipulated authenticity of documents?

MR. COLLINS, JR.: I say that in the fact of the fact that he is not on the pretrial statement. The defendant knew about this pre-existent injury prior to going to trial, he merely had to put it on the pretrial statement. And I point out to the Court Urbaniak versus Erie Lackawanna where we were excluded from putting on a witness that we had named as a direct rebuttal witness. The Court

precluded us from putting him on in direct because we named him as a rebuttal witness in the pretrial statement. Mr. Griffin has failed to name Dr. Carfagna or his records as evidence he intends to put in. That is the first basis of our objection. I also point out to the Court that we were not allowed to bring in Mr. Parker on the grounds that we hadn't mentioned him in our pretrial statement, and that any facts or evidence that he was going to testify to were irrevelant.

THE COURT: Mostly the latter.

MR. COLLINS, JR.: Our second ground for this motion is that the evidence that Mr. Griffin intends to offer is irrevelant within Section 401 and 402 of the Federal Rules of Evidence, in that it has no probative value, then Mr. Eggert admitted on the stand that he had a pre-existing injury, he admitted Dr. Carfagna didn't treat him, that he has nothing to do with this accident, and treated him prior to the accident. There is no question of that. Mr. Griffin's offer of evidence on that is irrevelant to the case,

it serves no purpose. We are also moving under Rule 403 of the Federal Rules that this be excluded as unduly prejudicial to the plaintiff. It is the plaintiff's position, as set forth in the affidavit, that it is prejudicial in the sense that Mr. Griffin is attempting to bring in an old medical problem which has been admitted to, it has no bearing on this case, and it is confusing in that it tends to confuse the jury. It is our belief that Mr. Griffin will try to put that before the jury in an attempt to confuse the injuries in this case with the pre-existing injury, and also that it is a waste of the Court's time. There was no denial by Mr. Eggert that he was treated by this Dr. Carfagna. Also under the rules of evidence on experts, there has been no foundation, there is no basis, Dr. Carfagna did not treat Mr. Eggert for this injury. I think at this time that the offer by Mr. Griffin, based upon our four objections, is highly prejudicial, and in fairness, and the way the Court has been applying its ruling on

evidence as opposed to plaintiff, it is our position that the Court should deny any evidence or testimony from Dr. Carfagna or his records at this point.

THE COURT: I don't know what it's all about until I see what is forthcoming. I have no idea what it is. I know we waved a piece of paper around in the courtroom the other day, and we had colloquy concerning it, and it was not useable at that time because there was no stipulation as to authenticity. Now, what further he has on it, I don't know.

MR. COLLINS, JR.: Your Honor, we will request that you take it out of the presence of the jury and make a determination as to whether it is relevant, as to our motion.

MR. COLLINS, SR.: Your Honor, we further move that the defendant make an offer of proof on this evidence that he intends to --

THE COURT: He doesn't have to make an offer of proof unless I deny something, then he can make an offer of proof for the record.

MR. COLLINS, SR.: I think for record purposes, out of the presence of the jury, an offer of proof

would be appropriate, and at that time Mr. Griffin can state his reasons for the record for offering this evidence, and we would be able to answer him.

MR. COLLINS, JR.: The entire purpose of the motion is to keep this from the jury on the Court's ruling. If we have the offer of proof by Mr. Griffin in front of the jury, then the Court has effectively denied the motion.

THE COURT: Well, I suppose it is worthwhile that I find out what it is all about, Mr. Griffin. As I say, I know you had a piece of paper here the other day which supposedly was a portion of Dr. Carfagna's records which you had expected to be the subject of a stipulation, but which was not, and --

MR. GRIFFIN: Your Honor, I think it is an unusual procedure, but I am glad to comply with the Court's direction. I propose to prove through a witness, who I will call to identify the records of Dr. Carfagna, that as of July 23, 1966 the plaintiff in this case, complained to Dr. Carfagna, according to the records, that he had aching and stiffness of both knees, especially on flexion, left

knee is more crepitant but right more troublesome; that the physical findings, according to the records, were no effusion present, but crepitant left knee, non-tender and mobile bilaterally. That is what I propose to prove.

THE COURT: That is as of what date?

MR. GRIFFIN: As of July 23, 1966.

THE COURT: 1966?

MR. GRIFFIN. Yes, sir.

MR. COLLINS, SR.: For what purpose, your Honor. That is why I made the motion. I think Mr. Griffin has to, for the record, state his purpose for offering this evidence. We have already admitted that he was crepitant.

THE COURT: No you haven't as to the right knee. There is conflicting testimony as to the right knee.

MR. COLLINS, SR.: We are talking about the left knee, your Honor.

THE COURT: I know, but it is quite significant whether or not there has been a degenerative situation tnat would have developed in the left knee, you would expect it would be similarly developing in the right knee. If it had

been developing in the right knee where there is no trauma or involvement with this accident or blow, why then you have to think the jury might be entitled to think there was a degenerative situation in both knees.

MR. COLLINS, JR.: This is in 1966, the accident was 1971. If Mr. Griffin wants to bring in treatment in 1967, '68, '69, is is taking one isolated incident to confuse the jury. Under Rule 403 of the Federal Rules he shouldn't be allowed to do it. I fail to see the Court's ruling in terms of the evidence that you wouldn't let us put in. You said three months was irrevelant.

THE COURT: I wasn't aware I made a ruling, Mr. Collins.

MR. COLLINS, JR.: Your Honor, on the Parker issue you said three months prior was inadmissible, irrevelant, too remote. The Court is now saying one examination in 1966 is relevant.

THE COURT: I haven't ruled on this, I'm trying to tell you.

MR. COLLINS, SR.: Your Honor, I say if you are going to bring the doctor's records in for diagnosis only, that is why it should be admitted, otherwise

we have a right to cross examine that doctor. You even ruled that I had to pay for his coming in to testify. I don't see him in court today. I think we have a right to cross examine the doctor if you are going to put his records in.

MR. GRIFFIN: Your Honor, can I just say frankly, if it isn't obvious why this evidence is properly for consideration for the jury --

THE COURT: I have no problem with relevance.

MR. GRIFFIN: All right. Obviously he complained of a crepitant knee, and that is a pertinent situation. This plaintiff tried to say he had some problem with his knees, there was a drinking problem or something, and the fact that he had a grinding crepitance in both knees in the past is pertinent for this jury, especially when he testified and denied that he had prior problems, and that was the testimony of Dr. Militello and --

THE COURT: What we have in this record are doctors' diagnoses, is that right?

MR. GRIFFIN: No, your Honor, we have complaints.

THE COURT: Let me see the document.

MR. GRIFFIN: Sure. I must say that I am only going to

offer the limited portion relative to the complaints and the findings.

THE COURT: Now, let's see. I can't quite remember what -- yes, Mr. Eggert did say that he had been a patient of Dr. Carfagna's through the years.

MR. COLLINS, JR.: Dr. Militello testified to the grating sound also.

THE COURT: What, testified to what?

MR. COLLINS, SR.: The grating in the left knee, your Honor.

THE COURT: Well, if properly authenticated -- I don't know at all what this would turn out to be -- I would admit one very small portion of it, that being on July 23, 1966 plaintiff here complained to Dr. Carfagna of aching and stiffness of both knees, especially on flexion, and nothing more. Crepitation I take to be something that no normal patient is going to come into a doctor's office and say, 'I have crepitation.' Consequently this becomes a finding or semi-finding of the doctor.

MR. GRIFFIN: Your Honor, how is this any different than a hospital record? This is a record kept in the ordinary course of business and on

the spot.

THE COURT: I am telling you that I am keeping out the opinion of the doctor --

MR. GRIFFIN: That is true, your Honor, but --

THE COURT: -- which I would keep out in the hospital records.

MR. GRIFFIN: Oh, no.

MR. COLLINS, SR.: Oh, yes.

MR. GRIFFIN: You can't, your Honor. The whole hospital record has the physical examination part in it. Every hospital record has -- a man comes in to the hospital, they make findings as to his extremities, this and that, and those findings are part of the record that goes into evidence. The whole admission diagnoses goes in evidence. Obviously, all parts of the findings of an examiner go into evidence in the hospital record. What else is a hospital record? The nurse said that he has high blood pressure --

THE COURT: What was done with the man, how he appeared, and so forth.

MR. GRIFFIN: Your Honor --

THE COURT: Anyway, we are not worried about his hospital records.

MR. GRIFFIN: This is the same thing. What difference is it if the doctor's examination happens to be -- suppose the man saw Dr. Carfagna in the emergency room of a hospital instead, and he made it out in the hospital as to his findings, it would be absolutely no different, and this is a record that is kept in the ordinary course of business, and I will be able to establish that this is the doctor's record, and the complaints and the physical findings are pertinent and, obviously, the crepitation is important here because that is the only finding that Dr. Curtin made, and that has been defined as a grating of the knee, and that is the only finding that Dr. Militello had. The fact that this man complained of grating and had a grating and crepitation in his knee pre-existing this is a pertinent factor in this case, and it is very important for the jury to consider it, and only to take that one narrow part about the complaints, as opposed to the physical findings -- may I see the record for a moment?

THE COURT: Sure.

MR. GRIFFIN: -- would be an unfair limitation, plus under complaints it says left knee is more crepitant, I mean that is under the complaint aspect of it, your Honor, and it is not under the physical findings section, it is under the complaints.

THE COURT: I know, that is why I said that it is unbelievable that a man comes in and says, 'My knee is crepitant.'

MR. GRIFFIN: Suppose he said, 'I have a grinding in my knee,' and the doctor uses the term "crepitant" that means the same thing as a grinding. I think that is -- one can argue anything that they want to the jury. This is the actual record, what is in there under the complaints and physical findings, and suppose the doctor was deceased, suppose the doctor moved, it is the same with the hospital, the hospital records has in it -- I would be glad to demonstrate from any typical hospital record -- you come in, you have an admitting diagnosis, that is part of the hospital records. It is admitted -- hospital records are admitted for diagnosis, treatment and all aspects.

They are not admitted to show what the man's religion is or those things, whether he has insurance or not, or somebody writes a legal opinion as to how the accident happened or something like that, and it gets -- finds its way in the hospital records. The hospital record is admitted as evidence or what the person complained of, what the diagnosis was, and what the treatment was, and that is the whole thing. When a doctor examines -- what is an x-ray report? That finds its way into the hospital records, an x-ray says such and such. That is the implicit conclusion of the person. Every business record has implicit in it some form of conclusion, but the purpose of the record and the business entry exception to any hearsay is that it is made concurrently, where the observations are right on the spot, and there is a mental process, I suppose, that goes in. This is very limited, limited to complaints and physical findings. I am not getting into diagnosis or treatment for other things. I propose a very limited part of this to

demonstrate that this man complained previously and had the grating sensation in the knee, and the jury may say, 'Well, that was six years ago, too remote.' They can argue anything they want to argue about it. I feel that it is pertinent and important to our case to establish this. Obviously, I wouldn't have gone through all the trouble that I have had to go through here to prove this, and now at the last minute we get an additional objection. Honestly, if it please the Court, I can't think of -- this is a perfectly proper piece of evidence. I see no difference between this and any of the hundreds of records that are admitted. How many reports of the Interstate Commerce Commission come in which are permitted to express causes of accidents, how many things come in repeatedly, and this is a -- certainly, under the complaint section where your Honor is concerned about the word "crepitant," if the doctor put down crepitant and the man said grinding, that is still the same complaint of the man because that is what crepitant means, he said he's got a

grating sensation, and to cut it off any earlier than that would be highly prejudicial. That is important that he had this simple grating of the leg. I suppose anybody can have stiffness, it is all part of the thing, but the grating is critical in this case, where the operation is to take out degeneration of cartilage which is -- and the positive symptoms all along are grating, that is the big thing. He denied to Dr. Godfrey and he denied to Dr. Militello that he had prior problems with his knee, right in the record, and that is important to have that, your Honor, and to deny us that opportunity it is -- that is the way this type of thing is proved all the time.

MR. COLLINS, SR.: In Lyles versus United States, 1958, 103 of Appellate Division 22; 254 Fed. 2nd 725, sert. denied; 356 U.S. 961; 2 Law Edition 2nd 1067, the court held, "Statements and hospital records that are admissible under the Federal Business Records Act are limited to statements of fact and do not include statements of opinion, such as the opinion of a psychiatrist." That was the

question there, that is what we are objecting to.

MR. COLLINS, JR.: Rule 403, your Honor, exclusion of relevant evidence on grounds of prejudice, confusion or waste of time reads, "Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Mr. Griffin made some good arguments but he didn't cite the law or cases. We are citing the Federal Rules. It is our position that this will confuse the jury. We have one treatment in 1966, we don't have '67, '68, '69 or '70 accounted for. Whether or not he ever went back to the doctor we could develop on cross examination.

THE COURT: He indicated he was a patient of Dr. Carfagna through the years.

MR. COLLINS, JR.: But so there is no question that we have to put Dr. Carfagna on, Mr. Griffin can argue that to the jury, just what he argued to you.

Transcript of Proceedings, October 13, 1976.

THE COURT: No, I will allow just that portion of it.

MR. COLLINS, JR.: Thank you.

MR. GRIFFIN: The portion that you just -- not even the crepitant part?

THE COURT: Not the crepitant part.

MR. GRIFFIN: Well, if I understand your Honor's ruling with respect to Exhibit 7, the only thing that I may prove are the words "aching and stiffness of both knees, especially on flexion."

THE COURT: Right.

MR. GRIFFIN: That I may not prove "left knee is more crepitant but right more troublesome," under the complaint category, and that further I may not prove "Husky W.M., no effusions present, but crepitant left knee, non-tender and mobile bilaterally," I may not prove that?

THE COURT: That is right.

MR. GRIFFIN: Now, your Honor, I would then state for the record the following offer of proof: I would offer to call and have in the court-room prepared to testify a Mrs. Lohr. The proof would show under my offer that Mrs. Lohr has been employed by Dr. Carfagna

preceding and at the time of June 23, 1966, as a nurse in his office; and she recognizes the doctor's records and has brought the original record here, and has compared Exhibit 7 and it is a true photocopy of the original record; and she would testify that these are the records of Dr. Carfagna relative to Mr. Eggert, that they were made in the regular course of business, and it was the practice of Dr. Carfagna to make such records in the regular course of his practice and to record at the time that the complaints were made and at the time of his examinations his findings relative to the person, and I would offer to prove as extremely relevant in the defense of this case, consistent with the argument that I had previously advanced, all portions in Exhibit 7 under complaints, Item 1, "Aching and stiffness of both knees, especially on flexion-left knee is more crepitant but right more troublesome." And under physical findings, "Husky W.M. - no effusions present but crepitant l. knee, non-tender and mobile bilaterally." In light of the Court's ruling

that all that I may prove is that part of this that make[s] reference to aching and stiffness or both kn[ees] on flexion, I feel that I do not choose, and that it would be incomplete, misleading to the tryer of the facts, and not properly probative, I do not care to put the witness on solely to prove that very limited fact because that would be prejudicial in the context of the case, and I respectfully except to the Court's ruling, and ask that your Honor reconsider that because I can't think of a more pertinent and proper bit of evidence on the medical aspect and damage allegations in this case.

THE COURT: I would have no problem if the doctor were here and could be cross examined on it. I don't want to let it in on this basis.

MR. GRIFFIN: Well, your Honor has ruled.

THE COURT: You have no other evidence? You are going to read some --

MR. GRIFFIN: I do have some admissions.

THE COURT: All right. Bring up the jury.

MR. GRIFFIN: Would you want us to go right in summations, your Honor, because there are motions and

whatever.

THE COURT: No, we will take a brief recess.

(Thereupon the jury entered the courtroom at 9:55 A.M.)

THE COURT: All right, Mr. Griffin.

MR. GRIFFIN: May it please the Court, at this time I would propose to read the jury --

THE COURT: Excuse me. I see we have an absent juror.

CLERK: That is Mr. Henderson, your Honor.

THE COURT: Oh, yes, Mr. Henderson. Mr. Henderson had a call that there had been a death in his family and he had to leave and, as a consequence, I excused him from further deliberations, and, Miss Slovanich, you move up into position Number 9. All right.

MR. GRIFFIN: At this time the defendants will read to the jury from the testimony of the plaintiff, Thomas W. Eggert, given in this courtroom on October 28, 1975, as taken from Defendant's Exhibit 2, the transcript thereof, and I would start at Page 125, Line 11:

"Q. You have now figured out that the level of the angle cock is quite a bit above the knee level of a person

" that is standing in a locomotive cab, isn't that true?

A. Yes."

MR. GRIFFIN: Turning to Page 128, Line 7:

"Q. You said you were on the fireman's side, right?

A. Yes.

Q. There is an emergency brake valve on the fireman's side, right?

A. Yes.

Q. That is a piece of safety equipment so that you can stop the engine, right?

A. Yes.

Q. You have told us that it was your custom to switch on and off so that part of the time the engineer worked one side, the fireman worked the other side, then you switched?

A. Yes.

Q. That is the customary thing?

A. That is right.

Q. You would have been on the fireman's side for a part of the duty on the 19th, would you not?

A. Yes."

THE COURT: Tell me what line you stopped at?

MR. GRIFFIN: Line 24. Turning to Page 140, Line 22:

"Q. And after you finished your tour of duty as the engineer on N&W 2500 on June 19, 1971, did you turn in a report

as to any defects in that particular locomotive?

A. June 19th?

Q. Yes.

A. There was no forms available.

Q. There was no forms available?

A. No forms available.

Q. So you did not turn in any report of any problems with Locomotive 2500 after your tour of duty on the 19th, is that right?

A. There was nothing wrong with it as far as I know, but there were no reports either.

Q. Well, then let's forget about the reports, you wouldn't have made a report because there was nothing wrong with it, is that right?

A. No, that is not right.

Q. Isn't that what you said?

A. I make one out regardless, if they are available.

Q. But you said there was nothing -- if you had a form, which you now say you didn't have, you would have reported no problems with N&W 2500, right?

A. No.

Q. What do you mean?

THE COURT: You mean yes, you would have made such a report?

THE WITNESS: No, I would have put basic things to have

done to the engine that all engines need after being out in the yard; check sanders, supplies, et cetera.

Q. Well, check sanders, supplies, but in terms of any specific problem with the N&W 2500 after it worked on Saturday, the 19th, you wouldn't have anything to report, is that correct?

A. Not to my knowledge, there was nothing wrong with it."

MR. GRIFFIN: That concludes at Page 142, Line 9. At this time, if it please the Court, the defendants Erie Lackawanna and Norfolk & Western respectfully rest.

THE COURT: All right, reserving your position to make motions, is there any rebuttal?

MR. COLLINS, SR.: Mr. Eggert, your Honor.

T H O M A S W I L L I A M E G G E R T, 25-A Garden Village Drive, Cheektowaga, New York, called in his own behalf on rebuttal, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COLLINS, SR.:

Q. Mr. Eggert, do you reca l Mr. Griffin on cross examination on October 28th or thereafter questioning you along the lines that he related at Page 142 as to an answer, the last answer that you made, "Not to my knowledge, there was

nothing wrong with it." Do you recall that?

A. Yes, I do.

Q. Do you recall this question:

"Q. You said somehow you had a problem with the seat turning or something like that when you used the same locomotive on Monday, is that it?

A. That is right."

Do you recall that?

A. Yes, I do.

MR. GRIFFIN: Your Honor, that relates to his claim of a subsequent date. That would not be pertinent to the portion that I read relative to the 19th.

THE COURT: Is that part of the transcript?

MR. COLLINS, SR. Yes, your Honor.

THE COURT: You can read that additional part of the transcript if you feel it ties in at all with anything that Mr. Griffin read. I don't know, he is saying it is on a different date.

MR. COLLINS, SR.: That is all I wanted on that portion, your Honor. Will you mark this for identification?

(Thereupon photograph referred to was marked Plaintiff's Exhibit 40 for identification.)

BY MR. COLLINS, SR.:

Q. Mr. Eggert, referring to Plaintiff's Exhibit 40 for identification, I think you have previously testified that the seats in the Erie Lackawanna 1200 series were similar to the N&W 2500, as far as around the seat portion and height of the seat from the floor and the distance of the seat from the window, would they be exactly the same?

A. Yes, sir.

Q. Other than the back rest, this picture would fairly and truly represent the E&L 1241 as it existed on June 22, 1971?

A. Yes.

Q. And you took that picture -- somebody else took that picture of you seated in the E&L 1241 at a date following the accident?

A. Yes.

Q. Do you remember when that was taken?

A. Not exactly.

Q. Does this picture fairly and accurately show the distance of the seat portion, the round portion that you sit on, of the N&W 2500 as it existed on the 21st and 22nd of June 1971?

A. Yes.

MR. COLLINS, SR.: All right. I would offer that in evidence, your Honor.

MR. GRIFFIN: May I have a preliminary examination, your Honor?

THE COURT: Yes.

PRELIMINARY EXAMINATION BY MR. GRIFFIN:

Q. Mr. Eggert, have you measured the height of the seat in Erie Lackawanna 1241?

A. No, I haven't.

Q. Have you measured the height of the seat in N&W 2500?

A. No, I haven't.

Q. Have you measured the distance from the floor to the angle cock or lever for the emergency valve in Engine 2500?

A. No, I haven't.

Q. Have you measured the distance from the angle cock to the floor in Erie Lackawanna 1241?

A. The valve isn't in the same position.

Q. The valve isn't in the same position on the 1241?

A. No, it is not.

Q. So in this picture that your attorney now has offered in evidence the valve would be in a different position, is that correct?

A. Yes.

Q. And you are unable -- well, you are unable to say whether the distance -- not having measured it -- you are unable to say whether the distance from the seat to the floor in each

of these locomotives is the same, is that correct?

A. I can tell by sitting in them.

Q. That they are exactly the same distance?

A. Yes, they are.

Q. You can tell that from sitting in them, is that it?

A. Yes.

Q. And the construction of the seats in the locomotive shown in this exhibit is different than the construction of the seats in the locomotive which is N&W 2500, is that correct?

A. There is no difference in the seat itself.

THE COURT: You mean the horizontal portion of the seat on which you sit?

THE WITNESS: Yes, sir.

BY MR. GRIFFIN:

Q. The construction of the back and the remainder are different, are they not?

A. Yes, they are different.

MR. GRIFFIN: I object, if the Court please, on the grounds that that is a different situation with a different location of the valve, and entirely different engine.

THE COURT: Let me see it.

MR. COLLINS, SR.: We are only offering this not for the back and the valve, we are offering it to show that Mr. Griffin on his cross examination

that he just finished at Page 125 asked him about the knee level from the standing position to the angle cock, and that from other pictures --

THE COURT: The angle cock isn't here.

MR. COLLINS, SR.: -- from other pictures you can show the relation of the angle cock to the window sill and the seat itself.

THE COURT: As I understand it, the present claim of Mr. Eggert is that he did not hit his knee on the angle cock while he was seated in the chair.

MR. COLLINS, SR.: That is true, your Honor.

THE COURT: I think in view of that that no part of the case involves anything that happened to Mr. Eggert while he was seated, and there is some testimony about his reason for being in the front seat, which concerned the construction of the backs of the seat, which Mr. Eggert says are different in the 1241, which is shown on Plaintiff's Exhibit 40, from the way they are in the engine that he was in, I will sustain the objection to Plaintiff's Exhibit 40.

MR. COLLINS, SR.: Your Honor, may I point out that on Page

125 Mr. Griffin asked this question, "You have figured out that the level of the angle cock is quite a bit above the knee level of a person standing in a locomotive cab, isn't that true?" I would like to have Mr. Eggert demonstrate that while standing his knee lever is similar or at the same height as if he were sitting. The knee doesn't change its position in relation to the floor merely because you are seated.

THE COURT: If he wants to so state, he can, if you want to bring that out.

DIRECT EXAMINATION BY MR. COLLINS, SR. (Cont'd.):

Q. Now, Mr. Eggert, if you are standing in a cab, your feet, of course, are on the floor or deck of the cab of the engine?

A. Yes.

Q. And your knees reach a certain height, isn't that right?

A. Yes.

Q. When you sit down, to your knowledge, do your knees come any closer t. the level of the floor or do they stay at the same height?

A. The same height.

Q. In Plaintiff's Exhibit 40 for identification, it shows you

seated, and the level of your knee is above the deck or floor of that cab?

A. Yes.

Q. And would that level be -- that height be the same if you were standing, to your knowledge?

A. Yes.

MR. COLLINS, SR.: All right. I offer it for that purpose.

THE COURT: It has no pertinency in that regard. What I meant to say was if you wanted to have Mr. Eggert give some independent testimony, not dependant upon a photograph, as to where his knee was when standing relative to the angle cock on the emergency brake valve in Engine 2500 on June 22nd, you may.

BY MR. COLLINS, SR.:

Q. Mr. Eggert, I realize that you didn't measure these angle cocks or the distance of your knee from the floor, but could you tell us approximately, give us your best approximation of the distance from the kneecap, your kneecap --

THE COURT: Who cares about the distance, the question is what is the relative height of his knee when standing relative to the angle cock and the brake valve.

MR. COLLINS, SR.: That is what I am asking.

THE COURT: Who cares if it is fifteen inches or nineteen inches?

BY MR. COLLINS, SR.:

Q. The question Mr. Griffin asked was, "You have now figured out the level of the angle cock is quite a bit -- whatever that means -- above the knee level of a person that is standing in a locomotive cab, isn't that true?" Now, Mr. Eggert, how much in your opinion is the angle cock -- was the angle cock in the N&W 2500, how much higher or how far above your knee level was it on the night of June 21, 1971?

A. I would say around the same level.

Q. Around the same level?

A. Yes.

MR. COLLINS, SR.: All right, that is all.

CROSS EXAMINATION BY MR. GRIFFIN:

Q. Well, it was your testimony that you gave last year that it was quite a bit higher, was that a lie or the truth when you gave the testimony that I read that you gave a year ago?

A. The valve is about even with the knee.

Q. Didn't you testify, as I read it, that the angle cock was quite a bit above the kneecap level at the time you claimed you had your accident, that you figured that you, wasn't

that your testimony last year?

A. I didn't figure anything out, I didn't measure anything.

Q. Sitting right here a year ago, October 28, 1975, you were asked this question and you gave this answer, did you not:

"Q. You have now figured out that the level of the angle cock was quite a bit above the knee level of a person that is standing in a locomotive cab, isn't that true?

A. Yes."

That was your testimony, wasn't it?

A. I don't know, I didn't see that.

THE COURT: You didn't see what?

THE WITNESS: I didn't see the question.

BY MR. GRIFFIN:

Q. Well, that is what the transcript of the testimony shows, isn't that true?

A. I'm sorry, I didn't see it. You were reading it, I didn't see the question.

THE COURT: The question is, Mr. Eggert, whether or not in fact you were asked that question and whether in fact you gave that answer.

MR. GRIFFIN: I think the witness suggests that he did not have an opportunity to see the transcript.

THE COURT: I understand.

BY MR. GRIFFIN:

Q. I will be glad to go slower and make sure that you can see

it. Were you asked this question on Page 125, Line 11, and did you give the answer that is recorded there, namely:

"Q. You have now figured out that the level of the angle cock is quite a bit above the knee level of a person that is standing in a locomotive cab, isn't that true?"

Did you answer yes?

A. Yes, I did.

Q. Did you tell the truth last year?

A. Yes, I did.

MR. GRIFFIN: That is all.

REDIRECT EXAMINATION BY MR. COLLINS, SR.:

Q. Just referring to Plaintiff's Exhibit 25 in evidence, Mr. Eggert, this shows the N&W 2500 with the front seat removed?

A. Yes, it does.

Q. Now, was that seat removed on the night of June 22, 1971?

A. No.

Q. And as far as the height of the horizontal part of the seat, the part you sit on, can that be raised or lowered?

A. Yes, it can.

Q. And can you tell us from this picture whether the seat as depicted here has been raised or lowered from the time -- the rear seat I am talking about -- from the date of June 22nd, 1971?

MR. GRIFFIN: I object.

THE COURT: Yes or no. I will allow the answer.

THE WITNESS: Would you repeat the question?

BY MR. COLLINS, SR.:

Q. Can you tell us from this picture whether this rear seat that is shown in the picture has been raised or lowered since the date -- the time of the accident?

A. No, I couldn't tell you.

Q. How does they raise and lower that seat?

MR. GRIFFIN: I object to that, if the Court please.

THE COURT: Sustained.

MR. COLLINS, SR.: Just one thing, Mr. Griffin, we put this picture in evidence, you stated that Mr. Wynn had taken the picture, do you have any date as to the date and time the picture was taken?

MR. GRIFFIN: I previously gave that information, Mr. Collins. It is an improper procedure, I don't know what he is about, he rested his case. I gave that information.

MR. COLLINS, SR.: Didn't you have a sheet of paper with pictures on it, it has dates on as to when they were taken by whom?

THE COURT: 25 is in evidence. Go ahead.

MR. COLLINS, SR.: Do you have that piece of paper?

MR. GRIFFIN: Your Honor, I am not a witness in this case.

THE COURT: Go ahead.

MR. GRIFFIN: If this is going to be handled outside the presence of the jury, I would be glad to, but it is improper procedure.

THE COURT: The photograph is in evidence, consequently there can't be further questions about it unless you put a witness on the stand.

MR. COLLINS, SR.: All right, your Honor. That is all.

THE COURT: I want to clarify one thing, we have gone over it in the testimony before, but the engine was going westerly and slowing down, was it now, at the time this happened?

THE WITNESS: Yes.

THE COURT: And the front seat then on the fireman's side was to the west of the seat that you would normally sit in as a fireman?

THE WITNESS: Yes.

THE COURT: If I understand it, you were in the process of having risen and going back to that back seat?

THE WITNESS: Yes.

THE COURT: And then there was this impact on the engine?

THE WITNESS: Yes.

THE COURT: And the impact came from which end of the engine?

Discussion.

THE WITNESS: That would come from the east end of the engine, hitting the east end of the engine first.

THE COURT: All right. What happened to you when the impact hit the engine?

THE WITNESS: It knocked me backward into the back rest of the seat.

THE COURT: Which seat?

THE WITNESS: The front seat.

THE COURT: In other words, you had not yet moved around that front seat?

THE WITNESS: No, I hadn't.

THE COURT: You merely stood up?

THE WITNESS: Yes.

THE COURT: All right.

MR. GRIFFIN: Your Honor, implicit in the Court's questions may have been acceptance or non acceptance of some version of the plaintiff. I would ask the Court to explain to the jury that you were merely clarifying, that implicit in any of your questions is not that it happened or anything happened, you were just clarifying.

THE COURT: I am just clarifying the plaintiff's narration as to how it happened.

Discussion.

MR. GRIFFIN: The issue as to what, if anything, happened is solely in the province of the jury.

THE COURT: That is true.

MR. GRIFFIN: The Court has no feelings.

THE COURT: That is true.

MR. COLLINS, SR.: The plaintiff rests, your Honor.

THE COURT: All right. Now, we have come to the end of receiving all of the evidence, ladies and gentlemen, so everything we have from that point is now before you. The next stage will be that the attorneys will argue to you, each one contending what has been proved or not proven by all the evidence that you have, and then following that I will instruct you as to the law, and you will retire to deliberate. Now, I have two brief matters, and they will be brief, that I must take up before we get to the point of the closing arguments. So I will ask you to return downstairs, and I will have you back here, it won't be more than fifteen minutes, probably ten.

(Thereupon the jury exited the courtroom at 10:20 A.M.).

Discussion.

MR. GRIFFIN: May it please the Court, the plaintiff having rested, the defendant respectfully moves for a judgment dismissing plaintiff's complaint and for a directed verdict on the grounds that the plaintiff has not introduced any proof with respect to any cause of action under any federal statute, which is the sole basis of his claims before the Court. As I see it, and I won't make an extensive argument, your Honor, but he makes a claim that there was something wrong with the seat and therefore there is a defect, and therefore it caused an accident. Putting aside the matter of whether or not there was anything wrong with the seat, in that it wouldn't swivel, because that could well be an issue of fact for the jury, and putting that aside, he has expressly stated that he was up and out of the seat at the time he claims his accident happened. So there is no way that any condition of the seat could be a cause of the injury he claims in this case. At best it was an occasion or it was a circumstance, just as any other physical operating circumstance was present. At best

Discussion.

he sais that there was a -- that the seat did not swivel. There has been no evidence offered to show any regulation, duty or anything to the effect that seats must swivel. Let's assume for purposes of illustration that he was going to leave the locomotive at the time and go on the outside of the locomotive but that the door in the locomotive was locked, and he would have gone out the closest door but the door was locked, and the reason it was locked was because they could not find a key to open the door or there was something wrong with the lock, and instead of going out that door he went out another door, and in the process of going out the other door he claims he fell or went into some part of the locomotive. I see no difference, the door and the condition of the door would at best be an occasion or circumstance, in no way would it be a cause of the accident. The second theory that he claims is that he was thrown into a brake valve and he says that the brake valve should not have been where it was and that constituted a defect.

Discussion.

His own evidence undisputed is that on all the locomotives in the 2500 series that brakes valves are in this location. He introduced photographs of another series of engines where the brake valves were in the same location. No person has testified and no regulation has been offered to show that the brake valve is required to be any place else or that the brake valve is in any way defective, and so forth. The fact that on other locomotives by other manufacturers or other series they proposed to put it up there or put it behind is no evidence of a defect. There is no evidence of negligence in operating, there is no evidence of a defect, other than the man said it was there. Where does the location constitute a defect? You can say that as to any particular equipment. The fact that the man happens to be allegedly thrown into it, then it happens to be defective because it is there, you could have put it some place else. I say that is no evidence of a defect. With respect to his third claim, namely -- let me just say they introduced one picture

of one brake valve which had a metal thing around it. Now, there is no testimony that had been offered that that particular guard was customary, indeed they were not on all these series of engines.

THE COURT: There is nothing in the case about a guard or lack of guard.

MR. GRIFFIN: Then I won't argue it.

MR. COLLINS, SR.: The picture wasn't in evidence, your Honor.

MR. GRIFFIN: Now, the last theory they have is that there was some movement of the train that in some respect caused him to have an accident, caused him to go over. He expressly stated and his prior counsel has expressly admitted in the case that the movement of the train, any slack that may have been involved, was perfectly normal and to be expected, and that has been held in the Herdman case that I cited in my requests to charge, I think it is 352 U.S., that slack admitted to be, as this plaintiff admits it to be, as his counsel expressly stipulated it to be, cannot constitute any basis for negligence. That does not constitute any defect if they make a claim under the Boiler Inspection Act.

The only claim that they have relates to the slack, and he expressly agreed that slack was normal and to be expected, and no negligence can be based on that. So those are the three theories or contentions they have, your Honor, and --

THE COURT: Of course, I allowed in two additional ones, namely, there was negligence or abnormal operation of the locomotive producing a more severe slack run-in, and also the aspect of there not being any air in the cars. I don't know if you want to address yourself to those.

MR. GRIFFIN: If the Court please, there has been no evidence offered by the plaintiff, himself, relative to air. There has been no evidence offered as to a requirement of air. The only thing that the witness who came in, Mr. Godwin, said is that you use your judgment. If you have forty or fifty cars you might put in air. That is what he said, and he was talking about a movement totally unrelated to this movement. It was never related to this particular movement. The only testimony he gave related to a train

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of forty or fifty cars, and he said that you might use your judgment and have air in that particular type of movement, and that the engineer is in charge under Rule 106, he admitted that. So if that is the case, he proves himself right out of court, there is no evidence on the subject. Sure, there was no air, so what? There is no testimony that in making the movement they were making that night it was customary. First of all, that it was required to use air, no such testimony. There was no testimony that it was customary or expected or proper or any standard to use air in a movement of this nature. They brought in a witness who they claim was an experienced expert, and all he said was that he -- he started talking about long trains of forty or fifty cars, and he said, 'You use your judgment.' We don't have that. The only evidence here is you have twenty cars being pulled out of one track to be put on another track. The air isn't in this case in terms of any proof, regardless of your Honor's ruling on that, which I have quite strongly excepted to,

Discussion.

The gratuitous injection of something in the case and, secondly, with respect to the extra testimony of the plaintiff, it was volunteered, not solicited, not brought out by his attorney in any respect, that come out on the Court's direction, you struck that testimony, your Honor. If you look at this record, I made a motion to strike that testimony and the Court said, 'The motion is granted, that testimony is out of the case.' It was never reoffered. There was never any further testimony re-offered or any subsequent amendment to the pleadings. So the state of this record is that my motion was granted to strike, it shouldn't have been admitted in the first instance, and the Court granted my motion to strike.

THE COURT: Mr. Collins?

MR. COLLINS, JR.: Your Honor, just a couple of points. First of all, the claim under the Boiler Inspection Act, I am sure the Court is aware of it, the law says that the railroad can't use any locomotive which has any part or a pertinence which is no in a proper condition,

not safe, so that it would cause any unnecessary peril to life or limb. Our claim is, and I think the proof has shown it, that the railroad put Mr. Eggert on an engine that had a defective seat, that this defective seat wouldn't turn, and because of the event of the seat being defective and the need to pass signals, and so forth, he had to change seats. I think the Court is aware of the facts, and I don't want to belabor them, but the law is if the defect contributes in any way, no matter how slightly, to the injuries caused, you have a violation of the Boiler Inspection Act. That is the first claim. The second is the federal regulations make the railroad by law liable for the design and construction and maintenance and inspection, and so forth, of their locomotives. Our claim is that this brake valve improperly protruded into the cab so as to cause this engine to be unsafe, not in a proper condition, so as to cause unnecessary peril to life or limb. So under the Boiler Inspection Act we have a second claim, and even if Mr. Griffin claims they didn't construct the

engine, that doesn't matter, they are liable for it, they put this engine out there. Mr. Eggert testified and it is our claim that it was unsafe, it was an unnecessary peril to life or limb. I think that is enough right there to go to the jury on the Boiler Inspection violation. As far as the negligence, all the arguments that Mr. Griffin made to you, Mr. Griffin made to the Second Circuit, and they rejected them, the question of the air, the question of --

THE COURT: The air doesn't involve the Second Circuit.

MR. COLLINS, JR.: The question of negligence, which becomes factual determinations, Mr. Griffin tried to allege the slack was normal, and so forth. The question is whether the slack was abnormal under the circumstances and whether air should have been used and wasn't used, was that negligence on the railroad, whether the engineer decelerated at a rate not proper and safe, causing the slack to run-in, which also contributed to the accident. These are questions of fact for the jury. The question is was the slack

situation safe at this time, did the railroad give this employee a safe place to work. Even if this one occasion the slack ran in and threw him down, we are claiming it wasn't a safe place to work, we have negligence on the railroad. That is basically what the proof has been and what the plaintiff has testified to in this courtroom. The defendant has not even put on one witness. The only thing the defendant attempted to do is cross examine the plaintiff. They haven't brought any witnesses to substantiate what Mr. Griffin claims, it is all his testimony, and, as the Court knows, it is the testimony from the chair, not from the lawyers, that the jury will consider. Therefore we request that Mr. Griffin's motion be denied.

THE COURT: All right. What about the state of the evidence relative to air in the cars and any causative effect of that?

MR. COLLINS, JR.: Your Honor, there is testimony produced by an expert witness that the air in the cars would stop the slack from coming in and from throwing that engine, if there was air in

the cars the slack wouldn't run-in with as much force. The testimony of the expert was that in switching movements you put air in the cars to stop an adverse or unsafe slack action. Mr. Griffin has brought no testimony forth to say that that is not the way it is done or that is not safe. He is saying the plaintiff's version is wrong. If Mr. Griffin felt that way he should have brought a witness in.

THE COURT: What about Mr. Eggert's role in deciding whether or not to have air in the cars?

MR. COLLINS, JR.: The testimony of the expert was that the fireman running the engine was a qualified engineer, as qualified as Mr. Eggert, and Mr. Eggert was sitting as a fireman, Mr. Kendall was sitting as an engineer.

THE COURT: Mr. Eggert was the engineer?

MR. COLLINS, JR.: He was, but under the rules that Mr. Griffin cited, the conductor is also responsible for the safety and the operation of the train. The conductor could have directed air to be put in that train to protect Mr. Eggert at this time. Mr. Eggert was in the position of the fireman. He can argue

that on comparative negligence if he wants.

MR. GRIFFIN: Could I say something? Certainly if you had a railroad employee on every car turning a hand brake any time he wanted to stop the car maybe you would get a faster, maybe you would get a better stop, and assuming that was involved at all. There is any number of ways that you can think of that you could do it but there is no testimony here that you should put the hand brakes on everytime you stop a train of twenty cars or when slowing it down or moving it in a switching movement. There is not a bit of testimony from anybody that you should have put air in this entire train on this particular night. You read the testimony of Mr. Godwin. I had no questions of the person because what did he say, he said nothing. All he said was, 'Yes, sometimes with forty or fifty cars you use your judgment.' That is all he talked about.

THE COURT: All right. What about the state of the evidence relative to negligence in the operation of the locomotive?

MR. COLLINS, JR.: Your Honor, Mr. Eggert testified on the stand

that the locomotive came to a sudden, jerking stop causing the train to run-in, throwing him to the ground.

THE COURT: Mr. Griffin says that testimony was struck.

MR. COLLINS, JR.: Your Honor, it wasn't, because you asked us, 'Are you making a claim that Mr. Kendall improperly operated this locomotive?'

THE COURT: I allowed you to amend the complaint.

MR. COLLINS, JR.: We read the testimony of Mr. Eggert back, which he did say that, and the Court allowed it in, you did not strike that testimony.

THE COURT: I was wondering. Aside from his testimony, there is nothing more on that, is there?

MR. COLLINS, JR.: His testimony that it was improperly operated.

THE COURT: That is all we have?

MR. COLLINS, JR.: That is Mr. Eggert's testimony. Mr. Griffin has come forth with nobody to refute that.

THE COURT: Well, neither have you.

MR. COLLINS, JR.: The testimony of our plaintiff must be seen in the light most favorable to us. He testified there was a negligent operation.

THE COURT: I understand. You have to admit it is pretty skinny evidence. I don't know, I don't have a notation, Mr. Griffin, that the testimony was stricken. As we started out

on the morning of the 7th without a jury you made a motion to strike that testimony, and you harked back to the admission made on the first trial and on appeal and on direct testimony, and cited the Herdman case, and we read the testimony, and there was a motion to amend the pleadings to add the claim that the engine was improperly operated, and a further claim that the accident was caused or contributed to by lack of air in the cars. Now, there I do note, "granted." I have nothing here indicating what happened on the motion to strike the testimony.

MR. GRIFFIN: Your Honor, it is my recollection that the Court granted that motion.

THE COURT: Well, we will have to check that then, that is significant. Unfortunately, there is quite a lot of colloquy because we ran all through that, and the reading of it, and the amendment to the pleadings, and then it was decided that to -- plaintiff asked to continue with the case until yesterday -- that was undoubtedly the defendant that made that motion to continue it -- and to depose

the plaintiff at one o'clock on that day, and I continued it to nine o'clock this morning, so we will have to dig that up.

MR. COLLINS, JR.: Your Honor, if I recall the events, the Court might have granted the motion to strike if the claim was not made that the engineer was also negligent in the operation of the train. There was a discussion between the Court and plaintiff's counsel as to whether or not this engineer properly operated the train, and Mr. Eggert's testimony was read back to the Court, and the plaintiff said, 'Yes, your Honor, that is part of the claim.' At that point the Court allowed that to go in.

THE COURT: The question is whether or not I struck the testimony. If I struck the testimony as he had given the response to my earlier questioning, then, of course, we are in this posture with nothing in the record bearing upon any negligence of the operation of the locomotive.

MR. COLLINS, SR.: Your Honor, there would be, Mr. Godwin testified that if you put air in four cars --

THE COURT: That is a separate problem of lack of air

in the cars.

MR. COLLINS, SR.: The one operating the engine, he testified -- I put it in an analogy similar to the driver of an automobile, he is the one that can feel the situation and should know, the man sitting on the fireman's side, the testimony was that he wouldn't know, the one actually operating the engine should know whether there was a need for air. Mr. Godwin said on certain occasions if you have heavy cars you would need it, and the operator of the engine, be it the fireman or the engineer, would be the one to determine, and Mr. Kendall could have been negligent.

THE COURT: He didn't say that.

MR. COLLINS, SR.: Could have been negligent in that respect.

THE COURT: He didn't say it was the one who operated the engine, he said it was the engineer.

MR. COLLINS, SR.: Referring to the operator of the engine, not -- I beg to differ with you -- there is no testimony the man on the fireman's side is in control of the operation of the engine.

THE COURT: The engineer has the complete say as to who is going to run the engine.

MR. COLLINS, SR.: That is true.

THE COURT: He uses his discretion as to whether the other man has the expertise. The judgment must go with the position.

MR. COLLINS, SR.: If you are going to go that far, the thing you could do is try and show contributory negligence on the part of the engineer. That is not a bar in the FELA case, it just diminishes the damages.

THE COURT: I understand.

MR. COLLINS, SR.: That is it. I would like to ask the Court to admonish Mr. Griffin to stop referring to stipulations between -- and not to do it in his summation -- between previous attorneys and himself and the Court because I don't see any stipulation --

THE COURT: If there were a stipulation between the prior attorney, it would be as binding as if it had been made by you, Mr. Collins.

MR. COLLINS, SR.: I don't see any stipulation in the record.

THE COURT: That is right. What there was was really an admission made by Mr. Semple in his argument which was binding in that context at that time. It is not a stipulation that carried out throughout the case and the

retrial of it. All right. Now, we've got to look up that one thing.

MR. GRIFFIN: I may be helpful, it would have been at the end of the argument that was relative to the motion to strike.

THE COURT: I don't know where that would be because we had two motions, namely, your motion to strike and then the plaintiff's motion to amend the pleadings, and it well could be that the motion to strike would have been granted, if it was granted, prior to the consideration and acting on the motion to amend, because prior to amendment the testimony had no place in the case.

MR. GRIFFIN: Yes, that is definitely the way if occurred, your Honor, no question about it.

(Thereupon a search of the record ensued.)

THE COURT: Well, there is probably no way we can get that unless we produce the transcript and analyze it, so I will rule that it is in the case, the testimony of Mr. Eggert that there was negligence operation of the engine is in the case. Now, let's see what

we have here. I have interrogatories handed to me by the plaintiff. I am not going to use interrogatories.

MR. COLLINS, SR.: Exception, your Honor.

THE COURT: In plaintiff's requests, I am not allowing (e) because you talk of a proper working condition, I do have something in the charge that relates to a proper positioning of the valve. In (f) you have a clause at the top of the page that it goes over to which talks about necessary inspection and repairs not being made, that is not in. In (g), the same type of thing is not in. You have "or that it was not properly inspected and repaired." They are, of course, being told that it was the duty, non-delegable duty of the railroad to provide a locomotive which was safe and proper in its condition. I won't be telling them anything about inspection reports or repairs. (k) I am not giving, (l) I am not giving, (m) I am not giving.

MR. COLLINS, JR.: Your Honor, could we have a reason for the ruling?

THE COURT: We have nothing in the case really that

bears upon it. We have a lot of flap about unavailability of forms, we have a lot of this and that and the other thing, but nothing really that focuses on whether or not there was an inspection.

MR. COLLINS, JR.: There is a claim that repairs weren't made. The federal code imposes a duty -

THE COURT: What repairs?

MR. COLLINS, JR.: Repairs to the locomotive, your Honor.

THE COURT: You are going back to the March situation, I have put that out of the case.

MR. COLLINS, JR.: In this case we claim the repairs weren't made on this locomotive, it was unsafe, and that is a federal code, and we ask the Court to charge the jury that the railroad has a duty --

THE COURT: I am telling them it was negligence on the part of the railroad to put the locomotive out there in an unsafe condition. This has nothing to do with whether or not -- you know -- the underlying duty to inspect and repair, of course, is how you keep it in a safe condition. They have the primary duty to have it out there in a safe and proper condition, that pre-empts the rest

of it. As far as the defendants are concerned, I am not charging Number 3, I am not charging Number 4.

MR. GRIFFIN: I respectfully except to your refusal to grant those instructions and the substance of them.

THE COURT: All right.

MR. COLLINS, SR.: May I state that the defendants' Requests to Charge Number 1 and 2 are mis-statements of the law, and we object to their going in. With respect to Number 1, it says, "With respect to any claim of liability on the basis of a seat which would not swivel, defendant could only be held liable if such caused in whole or in part plaintiff's accident." Whole or in part is taken from 45 U.S. Code ammotated, Section 51, and it nowhere applies to a Boiler Inspection violation, as set forth in 45 U.S. Code, 23, which reads differently.

THE COURT: There has to be some causation from defect or --

MR. COLLINS, SR.: The wording of 51 is whole or part, that refers to negligence, but as far as 23, which refers to the Boiler Inspection Act,

it has nothing in there about whole or in part. It reads that -- I won't read it because you know it.

THE COURT: I don't know if I know it. Why don't you read it to me?

MR. COLLINS, SR.: "It shall be unlawful for any carrier to use or permit to be used on its lines any locomotive unless that locomotive, its boiler, tender and all parts and appurtances are in proper condition and safe to operate in the service to which the same are put. The same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless that locomotive, its boiler, tender and all parts and appurtances thereof have been inspected from time to time." It goes on and tells how they have to inspect, it has nothing to do with causation.

THE COURT: It has nothing to do with liability, it says it will be unlawful.

MR. COLLINS, SR.: It is unlawful.

THE COURT: It doesn't say that the railroad will be liable. It does follow from any episode of unlawfulness under that section, which

causes injury, produces liability.

MR. COLLINS, SR.: That is why we asked in the interrogatories as to whether there were any violations of this section and, if so, then as a matter of law there is liability and --

THE COURT: I am not going to give them interrogatories.

MR. COLLINS, SR.: -- there is no question of contributory negligence diminishing damages under that. It is the Safety Appliance Act as applied to locomotives. Then Number 2 states, "If you find that the seat was only a circumstance or occasion present and not a cause of the accident, then there is no liability on defendants' part by reason of any condition of the seat." Then again I state that Section 23 doesn't say it has to be a cause, it says "In any way contributes to the happening."

THE COURT: I am not giving those two verbatim. I am giving those two in substance, and the same on 5 and 6 and, of course, I don't know any that really I am giving verbatim according to the requests. Where I have said -- where I have implied they are in, they are in really in substance.

MR. COLLINS, SR.: Thank you, your Honor.

MR. COLLINS, JR.: Your Honor, could we have a ruling from you as to the reason why our interrogatories are not being presented to the jury?

THE COURT: I don't see any necessity for it.

MR. COLLINS, JR.: Thank you. Exception.

THE COURT: Yes.

MR. COLLINS, JR.: Exception to the requests to charge that the Court did not charge.

(Thereupon the jury entered the courtroom at 11:20 A.M.)

THE COURT: You are coming to the point where you are not going to have any faith in me. I said it was not going to be more than fifteen minutes. We are ready to proceed at this point, and the attorneys will, Mr. Griffin first and then Mr. Collins, will sum up the case to you and argue to you what each contends has been proven or not proven by the evidence before you. Knowing that we are going to be dealing particularly with evidence, bear in mind that nothing that they say is evidence. The evidence is what

you have heard from the witness stand and what you see in the documents. They will be talking about evidence, but keep in mind that they are just rehashing and going over what has been heard. As they will tell you, if your recollection differs from theirs, of course, your recollection controls. I do urge, however, that you pay close attention to their theories and what they are saying, and when you do retire to deliberate you can give those close attention. Mr. Griffin will sum up first, and then Mr. Collins.

(Thereupon Mr. Griffin summed up to the jury on behalf of the defendants.)

(Thereupon an off the record discussion ensued at sidebar.)

THE COURT: All right, Mr. Collins.

(Thereupon Mr. Collins, Sr. summed up to the jury on behalf of the plaintiff.)

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, I am going to have to ask you to bear with me without sending you downstairs, I hope you can. This will take probably a half hour. You have all of the evidence, you have the arguments of the attorneys, and what I shall give you now is the law which you should apply in your deliberations, and I urge you to pay close attention to it, and I hope that it is not difficult to follow.

There has been reference to this federal statute, the Federal Employers Liability Act, which gives the railway employees the right to sue in this court or other federal courts for damages for personal injuries which they suffer in the course of their employment, if the injuries result in whole or in part from the negligence of any of the officers, agents or employees of the railroad or from its failure to furnish the plaintiff with a safe place to work or from the railroad's failure to comply with the safety requirements under the Boiler Inspection Act.

The plaintiff, Mr. Eggert, was an engineer

for the defendant, Erie Lackawanna Railway Company. He brought the action to recover for the injuries allegedly sustained by him on the morning of June 22, 1971, while he was working in one of the co-defendant's engines, Number 2500, at the Bison Yard near Halstead Avenue in Buffalo, and we have the map of the yard as Plaintiff's Exhibit 2.

The basis for the lawsuit is plaintiff's claim that he was injured while performing his work duties for the defendants, and he claims that the injury was a result of unsafe working conditions, in that on June 22 he was thrown against an emergency brake valve while attempting to change seats in the engine cab, and he further alleges that if the front seat had swiveled properly he would not have attempted to rise from it, and thus the accident would not have occurred. He claims his injury was due solely and exclusively to the carelessness and negligence on the part of the defendant railway companies and, of course, being corporations, they can only act through their agents,

servants and employees. Generally their failure, he says, to furnish him with a safe place to work and their failure to comply with the required safety regulations caused his injuries. The railway companies deny all of these allegations, which is why we are here trying a lawsuit. Plaintiff contends further that as a result of the injury to his knee he was made sick, sore and lame, and he specified the regards of that, and he suffered a permanent disability which will continue to limit the extent of his gainful employment, and the defendants deny those allegations.

You have had evidence here, oral testimony from witnesses who took the witness stand, including the plaintiff, and documentary evidence that I have allowed in as exhibits, and reports, letters, photographs, hospital records, and they are before you.

The defendants admit that they at the time of the accident owned and operated railroads, and they were engaged in interstate commerce, which is a jurisdictional point. Erie Lackawanna admits that plaintiff was employed

by it as an engineer at this time, and Norfolk & Western admits that plaintiff was working in one of its engines.

Now, there are points in the case which are undisputed, but there are many more points of dispute, particularly the allegation of negligence of the defendants and their alleged violation of safety standards, and the connection between defendants' alleged negligence or safety violations and plaintiff's injury, and you have to resolve these matters in your deliberations, paying attention to these instructions.

I have already referred to the fact that the two defendants are corporations, and they operate, obviously, through their officers, employees and agents, and any wrong done by any such employee, agent or officer, which was committed in pursuit of the defendant corporation's business, is imputed to and charged to the defendant corporation, and the defendant corporation then through its officers, employees and agents in this case had a statutory duty to provide plaintiff with a safe place to

work, and also they were bound to comply with the required safety standards, and you, as the tryers of fact, have the job of determining whether the defendants failed to carry out the binding obligations, answering questions such as did each defendant do all that reasonably could be done to provide plaintiff with safe working conditions; did each defendant breach or fail to fulfill some other duty or duties which it owed to the plaintiff, and concerning the plaintiff's injuries, what were they, were they caused by wrongs of the defendants and, finally, possibly what damages, if any, should the plaintiff recover.

I have made mention that you have the duty and the power to make all of the factual determinations to dispose of the lawsuit. You are not to take any factual statement that I have made or may make, or any of the statements of fact which have been made or alluded to by any of the attorneys in the case, as binding upon you in any way. If I point out some facts, it may be that some are clearly beyond dispute, and others

are in dispute, and you have the duty, consulting with one another, to determine those factual issues where the evidence leaves room for argument. My job is to tell you what the law is, and you are bound by my declarations of the law. I have tried to preside impartially and not to express an opinion one way or another as to what you should find the facts to be. I have had to rule from time to time on the admissibility of evidence and on motions, as they were made in regard to the applicable law, but you are not to infer from any such ruling that I have made or from anything that I have said in the course of the trial that I have any views for or against any of the parties to the lawsuit and, in any event, any views of mine would be totally irrevelant because your recollections of the evidence and your determination of the issues are what control.

There are two alternate theories of law upon which you are asked to determine the case. They are generally described as, first, strict liability for violation of

the statute and, secondly, negligence. Because each theory has different rules of law under which the facts are to be evaluated by you, you must in your deliberations separately consider each theory.

As to the violation of the Boiler Inspection Act, the plaintiff alleges that at the time and place in question the locomotive on which he was working was defective, in that the front seat on the left or fireman's side did not and would not function properly by swiveling freely, and that an emergency brake valve was improperly located in the locomotive cab. He further says that the defective seat and the valve's location were causes of his injuries and the consequent damages.

The Boiler Inspection Act provides in full: "It shall be unlawful for any carrier -- and I interject here that each defendant railroad is what is known as a carrier -- it shall be unlawful for any carrier to use or permit to be used on its lines any locomotive unless that locomotive, its boiler, tender and all parts and appurtenances

thereof are in proper condition and safe to operate in the service to which the same are put. That the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof had been inspected from time to time in accordance with the provisions of the law, and are able to withstand such test or tests as may be prescribed in the rules or regulations provided for in the Act."

The statute does not make the defendant railroads the guarantors of the safety of their employees, and the plaintiff is not entitled to an award of damages simply because he was injured. In order to recover he must prove that there was a violation of the statute by the defendants or either of them, and that his injury was caused in whole or in part by that violation. If he proves by a preponderance of the evidence that either defendant violated the statute and that the violation contributed to his injury, he is entitled to recover even

though the railroad exercised care and was not negligent, and even though the plaintiff was guilty of negligence contributing to the occurrence, or with knowledge of the violation, continued to work on the locomotive. The statute is violated when the locomotive is operated in an unsafe condition, that is, when it is used in a condition which presents an unnecessary peril to life or limb, and it is for you to determine whether the front seat was defective and whether the presence of such seat or the arrangement of the emergency brake valve was a violation of the statute. If you find that the statute was not violated, or that although it was, such violation played no part whatsoever in causing plaintiff's injury, then your verdict would be for the defendant railroad's. If, on the other hand, you find the statute was violated, and that plaintiff's injury was caused in whole or in part by such violation, your verdict would be for the plaintiff, and you would proceed to consider the question of damages.

Charge of the Court.

Now, a negligence action being the second theory of the case, it is claimed by the plaintiff that the defendants were negligent, and on that basis the plaintiff seeks an award of damages. Plaintiff will not be entitled to recover from the defendants unless negligence is proved on the part of the defendants or either of them, and negligence, in general, means fault. In order to find that the defendants were or that either or them was negligent, you would have to find that they or it failed to do something which a reasonable person should have done or did some act which a reasonable person should not have done under the circumstances, and the mere fact that an accident happened is by itself no evidence of negligence.

Now, as it relates to the defendants, this action is brought under an act of Congress known as the Federal Employers Liability Act, which provides in pertinent part as follows: "Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed

by such carrier for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works or other equipment."

Now, in order to prove his claim for damages for negligence against the defendants, the burden is upon the plaintiff to establish by a fair preponderance of the evidence, which I will define for you later, the following facts: First, that one or both of the defendants, through its officers, agents or employees, was negligent and, secondly, that the plaintiff's injuries were caused by the negligence.

Now, everyone is held to the duty of taking reasonable precautions to avoid injuries to other persons where the possibility of such injuries, if caution is not exercised, can be reasonably foreseen. Negligence requires both the forseeable danger of injury to another, and conduct unreasonable in proportion to the danger. A person is

not responsible for the consequences of its or his conduct unless the risk of injury was reasonably forseeable. The exact occurrence or the precise injury need not have been foreseeable, but some injury as a result of negligent conduct must have been not merely possible but probable. If a reasonably prudent person could not forsee any injury as a result of his conduct or if his conduct was reasonable in light of what he could foresee, then there was no negligence and, conversely, there is negligence if a reasonably prudent person could foresee injury as a result of his conduct or if his conduct was unreasonable in the light of what he could foresee. The standard of conduct which one is expected to maintain is not that of perfection. The standard of conduct, as I have said, is such do care as a reasonably prudent person -- I have to leave it to you to decide what a reasonably prudent person would do -- acting in the same circumstances and under the same conditions as those being considered by you in this case would exercise, and it

is not the care that you or I as individuals might exercise which should guide you, but rather the care that one ought reasonably to exercise given the same opportunities for knowledge and the same facts and circumstances as these parties had available to them at the time of the accident. The defendants here were not required to guard against all possibility of accident. The requirement is that one exercise reasonable care to avoid dangers which can reasonably be foreseen or recognized, and if you find that the defendants, through their agents, servants or employees, failed to exercise that degree of care, then I charge you that the defendants or that defendant was negligent.

Now, the law imposes upon the railroad a non-delagable duty of exercising reasonable care to provide its employees with a safe place to work, including, as is pertinent here, a locomotive, the condition of which is safe and proper. By "reasonable care" is meant that the person or persons operating a railroad, and acting through the officers,

agents and employees, shall exercise that degree of care which a normal, responsible and prudent operator of a railroad would exercise under the circumstances in order to avoid injury to another person, which injury could be reasonably foreseen. If you should find that, as the plaintiff claims, there was a defective condition or situation existing in and about the place he was working which created a risk of unnecessary or unusual danger to him, and that the railroad's officers, agents or employees knew or in the exercise of reasonable diligence should have known of any such condition or situation, then this knowledge is imputed to the defendant railroads or to the particular defendant.

Now, the statute, as I said before, does not make the railroad a guarantor or an insurer of the safety or health of its employees. In other words, the mere fact that an accident occurred or that an injury was sustained does not necessarily mean that a defendant railroad was negligent or that the plaintiff is entitled to recover,

and you should not find liability unless you are satisfied by a fair preponderance of the evidence that negligence on the part of a defendant railroad has been proven.

The defendant Erie Lackawanna is not required to provide an injury-proof place to work or to furnish its employees with the best, safest or most perfect working conditions. If you find that the injuries sustained by the plaintiff were not caused or brought about by any negligent act or failure to act on the part of the defendant railroad or by any of either the agents, servants or employees, then you must find that the particular defendant railroad was not negligent. Note, however, that it does not matter how slight the negligence, if any, on the part of a defendand railroad might have been. If you find there was any negligence on the part of a defendant railroad, and that that negligence wholly or partially caused the incident which produced the plaintiff's injuries, you should find that the defendant is negligent as a part of your verdict.

Now, not providing a safe place to work is the essence of the plaintiff's claims, and yet that omission more understandably relates to alleged negligence. Plaintiff fundamentally is saying that the defendants, again through their officers, agents or employees, knew of a particular risk before this occurrence, and they failed to take reasonably necessary steps to safeguard the plaintiff, that is, to provide him with safe working conditions or a safe working place.

Now, the plaintiff contends that his injuries were caused by the inoperative front seat, which initially compelled him to sit in it, rather than in the rear seat, due to the lack of leg room, and by the front seat's failure to rotate, which compelled plaintiff at this time to rise from it to go to the rear seat at a time when the engine experienced a blow from the east from the slack run-in from the stopping cars, so that plaintiff was knocked into the front seat and then forwardly so that his knee struck the valve, and plaintiff

went down to the floor. He contends that the defective seat and the allegedly protruding valve constitute negligence in not providing a safe place to work. This duty to furnish plaintiff with a safe place to work is non-delagable, it remains with the defendant railroads, and you are the judges whether a place to work is safe. Defendants, however, need only act reasonably. They must perform as a reasonable person or persons running a railroad would act, and this is where you must decide out of your collective back-grounds and experience what is reasonable. However, if you do find that the defendants were negligent, you must also consider whether such negligence wholly or partially was the cause of the incident, and whether the incident wholly or partially caused the plaintiff's injuries. In short, even if you find the defendant negligent, you may not find the defendant liable in damages to the plaintiff unless you also find that such negligence either partially or wholly caused the incident, which in turn partially or wholly caused the plaintiff's injuries.

Thus if you were to find that the injuries of the plaintiff were caused entirely by plaintiff's own negligence or by some other cause unrelated to any negligence on the part of the defendants, you may not return a verdict for the plaintiff. If you find that the position of the valve had nothing to do with the causation or aggrevation of plaintiff's injury, you would not give any consideration to its wrongful positioning. Furthermore, if you find that the defendants or either defendant negligent in a way which wholly or partially caused the accident and the injury, you are then required to determine whether the plaintiff, himself, was negligent in any way which contributed to the causing of the accident or his injury. The law requires the plaintiff, just as anyone else, to exercise reasonable care for his own safety. If you find that the plaintiff's own negligence or carelessness partially contributed to the accident, this alone would not prevent him from receiving damages from the defendants. He then would be considered to be contributorily negligent,

and you would be required to determine the proportion of the blame or fault which rested upon him. You see, in these cases the existence of contributory negligence, if proved, operates merely to reduce the net recovery of the plaintiff in proportion to the amount of his contributory negligence, and I will advise you more particularly on that later. I must remind you that if you find the defendants were liable on the basis of a violation of the Boiler Inspection Act, you do not consider any negligence by the plaintiff resulting in his injury.

For the purpose of this action, injury or damage is said to be caused or contributed to by an act or failure to act or by a violation of the statute when it appears from a preponderance of the evidence in the case that the act or omission or violation played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the defendants or a violation of a statute contributed in any way toward

any injury or damage suffered by the plaintiff, then you may find that such injury or damage was caused by the defendants' act or omission or violation. Now, stated another way, an act or omission or violation is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes. This does not mean that the law recognizes only one cause of an injury or damage, consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or damage, and in such a case each may be a cause for the purpose of determining liability in a case such as this one.

Now, the plaintiff also bases his claims for his recovery on two further acts of negligence, which can exist when one does that which a reasonable person should not do or omits to do that which a

reasonable person should do under the known or knowable circumstances, including the forseeability of harm or injury from the act or omission. Firstly, he says that the slack run-in which struck this engine was more than usually severe due to Mr. Kendall -- he being the fireman who was allowed by Mr. Eggert on this occasion to be operating the engine -- due to Mr. Kendall's negligence in the operation of the locomotive. He said that Kendall braked the locomotive too abruptly, producing the harder blow. The evidence on this is slim, but if you find it believable, if you find that Kendall's actions were unreasonable and caused plaintiff's injury, then you may find the defendants liable and responsible to plaintiff in money damages. Secondly, plaintiff says that there was no air in any of the twenty cars which the locomotive was pulling, so that the brake shoes could not be operated on those cars. Mr. Godwin, who testified here, said that air in some or all of the cars would have produced a smoother stop and a lessened blow to the engine. Again,

the evidence that there should have been air in the cars is slim. Mr. Godwin spoke of longer trains and heavy loads, and said it was a matter of judgment. However, if you find that a reasonable person in charge of this locomotive would have had air in some or all of the cars, and they ought to have foreseen the event or injury, and that the omission caused the accident or injury, then you may find the defendants responsible to plaintiff in monetary damages.

Now, with regard to proof of the various issues in the lawsuit, there are rules of proof which you must apply. Plaintiff in this case has the burden of establishing the necessary facts by a fair preponderance of the evidence as to defendants' negligence, causation and damages, and, of course, also as to any violation of the Acts. The only exception to this rule is that the defendants have the burden of establishing any necessary facts to show contributory negligence by the plaintiff, and again by a fair preponderance of the evidence. Plaintiff, in other words, has the burden of proof of all elements

except contributory negligence, and that has to be proved by the defendant. Now, of course, you realize that you would not be concerned with contributory negligence unless you have first found that the defendants were negligent.

Now, as to the plaintiff's burden of proof on his claim of an injury resulted from a violation of the Boiler Inspection Act, again he has the burden of establishing the necessary facts by a fair preponderance of the evidence as to the defendants' violation of the Boiler Inspection Act. In that situation, if you did find such violation, you would not be considering whether or not or any degree of contributory negligence on the part of the plaintiff.

As the sole judges of the facts, you must determine which of the witnesses you believe and what portion of their testimony you accept, and what weight you attach to it. At times during the trial I have sustained objections to questions without permitting the answer, and I do not remember whether I struck any of the testimony that

had been given, but if I did, I told you to disregard it and dismiss it from your minds. Now, you may not draw any inference from a lawyer's unanswered questions, and I remind you that what the lawyers say is not evidence, nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you, and such items that I have excluded are not legally admissible and should not be within your consideration.

Now, the proof to sustain the plaintiff's burden of proof can be taken from any of the evidence in the case, whether the evidence be in the form of oral testimony given by a witness on the stand or by documentary material which I received in evidence, and it can also be established by inferences from that evidence. The whole point is with regard to the plaintiff's basic claim, including liability and damages, you must find that the fair preponderance of the evidence sustains his claim. A fair preponderance of the evidence does not depend

upon the number of witnesses or documents produced, but rather it depends upon the relative weight of the believable evidence in the case. For example, the evidence supporting negligence must outweigh, however slightly, the evidence supporting absence of negligence before a finding of negligence could be made. The same could be said for any other issue, and thus if you find that the plaintiff has done no more than establish a position which is equal in evidentiary weight to that established by the defendant, and you are unable to decide whether defendants were negligent, then the plaintiff has not met his burden of proof. Of course, you would bear in mind that plaintiff has the burden of proving by a fair preponderance of the evidence all issues in the case, except if you have found the defendants to be negligent, then you would decide whether the defendants had carried their own burden of proving contributory negligence.

Now, in this matter of deciding their preponderance of the evidence, it is useful to envision in your mind a mechanism, which

Charge of the Court.

I cannot send to the jury room with you, but you may remember the old fashioned balance, which had a tray hanging on either side of a beam, and an indicator in the middle which would say whether one tray or the other outweighed the other, and using this imaginary device, if you are deciding a particular issue and you take the evidence that bears in favor of the plaintiff on that issue, giving to it the weight that you decide it should have, and place that in one tray, and you take the evidence that bears in favor of the defendant on that same issue, again giving it the weight you decide it should have, and put it in the other tray, and if in your minds eye you see that this needle has moved at all in the direction of the plaintiff's tray, you would say that the plaintiff has carried his burden of proof on that issue. If, on the other hand, you would see that the needle had moved, no matter how slightly, in the direction of the defendants' tray, you would say that the plaintiff had not carried his burden of proof. Important to

to this concept is this, if in your minds eye you see that the needle has not moved in either direction but remains exactly in the middle, you would say that the plaintiff, having the burden of proof as to that issue, had not carried his burden because he must make that needle tip, no matter how slightly, in the direction of his evidence, his evidence must outweigh, no matter how slightly, the evidence of the defendant on the same issue.

You are the sole judges of the weight you are going to give to the testimony of the different witnesses. Some of the evidence made to you be more believable than other evidence. The matter of the credibility, the believability of the witnesses you have heard is one of the questions of fact which you must take into consideration in arriving at your verdict, and you are entitled to and you should utilize in this connection your observation of the witnesses as they appeared before you and your own experience in your respective lives in deciding whether or when somebody is telling the truth. You may find one or more witnesses was a better

observer, had a more accurate memory or was otherwise more reliable than other witnesses. You can take into consideration in evaluating the testimony the demeanor of the witnesses on the stand, and the interest or lack of interest which the witness has in the outcome of the litigation. Further, if you find that a witness knowingly testified falsely concerning any material matter, you have a right to discount or disregard his testimony or you can take from his testimony that which you believe to be true and disregard that which you believe not to be true. A witness testifies falsely when he does so intentionally and not merely because of mistake or other innocent reason.

Usually witnesses are not allowed to give opinions, but there is a category of witnesses called expert witnesses who are, and these are witnesses who by education and experience have become expert in some art, science, profession or other calling, and they are allowed to state their opinions as to relevant and material matters in which

the profess to be expert, and they may also state their reasons for the opinion. Now, in this case the plaintiff, himself, to a degree or one facet, Mr. Godwin on another facet, Drs. Godfrey and Militello were allowed to be expert witnesses and give opinion testimony. You should consider each expert opinion received in evidence in the case, and give to it such weight as you think it deserves. If you should decide that the opinion of an expert witness was not based upon sufficient education or experience, or if you should conclude that the reasons given support of the opinion are not sound, or if you feel the opinion is outweighed by other evidence, or to the degree that you may find a witness has warped his opinion due to his interest in the outcome of the lawsuit, you may disregard the opinion entirely. The opinion of a doctor as to the condition of a patient can be based entirely upon what we call objective symptoms, which are revealed to the doctor through his observations, examination, test or treatment, or his opinion

may be based simply upon subjective symptoms, which are revealed to the doctor only through statements made to him by the patient, or the opinion could be based partially upon objective symptoms and partially upon subjective symptoms. Now, to the point that any opinion which has been testified to by a doctor is based upon subjective symptoms described to him by the patient, you may consider the accuracy of the patient's statements in determining the weight to be given to the doctor's opinion.

I mentioned damages now, as I must, and the fact I do mention the subject is not to be taken by you as any indication of any view of mine on the subject of whether the plaintiff is entitled to any recovery. The law requires that I discuss the subject of damages with you. Unless you first find that the plaintiff is entitled to recovery, you are not to consider the subject of damages at all. Any award of damages must be reasonable and based upon the evidence. You are not permitted to award speculative damages. This means you are not to include

in any verdict compensation for any loss which is wholly remote or conjectural. If you conclude that the plaintiff is entitled to a verdict, you will not add any sum of money to the amount of the verdict on account of federal or state income taxes because the amount awarded in a verdict, if any, is not taxable income to him within the meaning of either tax law. Moreover, you are not to include any amount to cover his expenses or attorneys fees for bringing the lawsuit because defendants are not chargable or liable for this payment under our law.

I stress again that you are to find the facts, and any examples or factual indications that I have given do not indicate any opinion on my part as to how you should find on any issue or whether you should award any damages against the defendants. These matters are solely for your decision, and I have no part in making that decision, other than to tell you what the governing law is.

If you have found that the defendant

railroads are liable to plaintiff on the ground of negligence or on the ground of having negligently failed to furnish a safe place to work or for violation of the statute, it would be then your duty to determine the total amount of damages suffered by the plaintiff as a result of the incident. You are expected to award damages only to the extent that they will reasonably compensate the plaintiff for the losses which he has suffered. The object of damages is to place the plaintiff in the same position in which he would have been if the incident and the resultant injuries had never occurred. Items of special damages which you may award include loss of wages since the time of the injury, such times as you may find he was unable to work due to his injury, and a reasonable amount for any pain and suffering which he has suffered or will continue to suffer, and other pecuniary loss, such as medical expenses, which you find the plaintiff has sustained by virtue of his injuries. As to any pain and suffering in the future,

which you may find, which will result from the injuries, you may consider that the plaintiff, who is now forty-six years of age, and may suffer for the remainder of his life, the length of his life is up to you to determine, or he could suffer for some shorter period. I advise you, and it is only advisory, that the actuarial tables show that Mr. Eggert's life expectancy is 26.8 years. Those same tables show he has an expectancy of work, of being productive in the labor field, of 18.8 years. Now, we know, of course, the people in the position of Mr. Eggert, working for the railroad, do face some retirement time. I think there is no question but that there is a mandatory retirement at sixty-five. That doesn't knock him out of all other employment. Again, if you figure that he was deterred from gainful employment, you would not pay attention to the fact that he would be off the railroad at sixty-five, and you would consider that he could thereafter have other gainful employment. These expectancies are only for your guidance,

they are not controlling. You could decide that the plaintiff would live longer or his life would be shortened, and you could determine that he would work a longer or shorter period than as stated.

With respect to any loss of future earning power which you may find plaintiff has sustained as a result of the accident, there are these rules. He claims his future earning power could be impaired, and if you find that he would suffer such damage in the future, you would determine the amount of that future loss after a full consideration of such factors as his possible potential earning ability as it existed prior to the incident, bearing in mind such factors as his age, life expectancy, general health, and so on, and you would consider all the uncertainties of his future life, other than those caused by the incident. After allowing for any loss in his future earning capacity, which you find resulted from causes other than the accident here involved, then you would be able to calculate the loss of any future earning capacity chargeable to

the defendants in this case. If in your award to the plaintiff, any award you might make, you include as any portion thereof reimbursement for loss of future earnings, your verdict should be based only upon those items present value. What that means is that any damages which you award to him in this case will be paid to him at once, even though they are intended by you to compensate him for his loss of future earnings and, of course, he would not have received those future earnings until sometime in the future. The defendant is entitled to be credited for this advance payment of future damages, and this is done by giving the defendants credit for that amount of interest which the plaintiff will be able to earn on the money which will have been paid in advance of the time when the earnings would have been normally received. In other words, he would be figuring the total amount of future loss sustained by him, if you find any loss of earnings would be suffered at all, and after you have determined the total amount of future earnings,

you will discount or reduce that amount at the rate of interest which you find that the plaintiff would be able to earn by investing the money in such a manner as to reduce the damages as they accrue. In this connection you may, if you want, use an annual interest rate of six percent or you can use any other rate which you find reasonable.

Now, if you find that before this collision the plaintiff had a pre-existing knee injury, and you further find that because of the accident this condition was aggrevated so as to cause suffering and disability, then he is entitled to recover for the disability or pain resulting from the aggrevation, and recovery must be confined to that damage due to the enhancement and aggrevation of the pre-existing condition, and not the condition itself. In essence, then plaintiff would be compensated to the extent that he was thus further disabled by the defendant's negligence or by a violation of the Boiler Inspection Act.

Charge of the Court.

I charge you that the fact that plaintiff is an individual and defendant is a corporation is not to enter into your deliberations or influence your verdict. All persons, including corporations, partnerships and other organizations stand equal before the law and are to be dealt with as equals in this court of justice, and also put out of your mind and consideration any sympathy or bias that you find otherwise existent perhaps because of the fact that you may think there were injuries and you may be sympathetic.

Now, in reaching your verdict, it is helpful to determine firstly whether or not the defendants either violated the requirements of the Boiler Inspection Act or whether they were negligent in one or more of the particulars alleged. If your unanimous answer to both parts of that question is no, then you would return a verdict for the defendants of no cause of action. If your unanimous answer is yes to both or either parts of that first question, then you have a second issue to

determine, namely, did the violation of the statute or the negligence of the defendants cause or contribute to in any degree damage to the plaintiff. Again, if your unanimous answer is no, you would return a verdict for the defendants of no cause of action. If, however, your unanimous answer is yes, you must then find the answer to a third question, namely, what is the dollar amount which would fairly compensate the plaintiff for his injuries? If you only find that plaintiff's injuries were caused by the negligence of the defendants, and there was no violation of the statute, then you must decide further whether the plaintiff, himself, was negligent in some manner which contributed to the incident or to his injuries. If you find that he has not, then you would return a verdict in the plaintiff's favor for that amount which you have already determined. On the other hand, if you should find from a fair preponderance of the evidence -- of course, I remind you the defendant has the burden of the proof on this issue -- that the plaintiff, himself, was guilty of some

contributory negligence, and that plaintiff's fault caused or contributed to any injuries which the plaintiff may have sustained, then you must compare the negligence of the parties, and return a verdict in favor of the plaintiff for a reduced amount based upon that comparison. Thus, if you have decided initially that the plaintiff was damaged in the amount of X dollars, and that he was, for example, twenty-five percent responsible, you would return a verdict for the plaintiff in an amount which is twenty-five percent less than what you had determined the damages to be or, stated differently, you would give him an award or verdict of seventy-five percent of that total damage.

Now, when you go into the jury room you should pick one of your group to speak for you when you come back into court. If for any reason you have to get in touch with me, do so by a written note that you will hand to the deputy marshal who will be on duty outside your jury room. Do not ask the deputy marshal or anyone else what your duties are. If you have any question, ask

me by a note. If you want to ask any question about any of the testimony or any of my instructions, or have read back to you any portion of the testimony or my instructions, again let me know by a note and, finally, when you have reached a verdict by unanimous vote, let me know by note, and we will bring you to the courtroom to announce it. You should deliberate carefully, and I know you have been paying attention to the evidence, but think about the issues, and discuss them among yourselves, and listen carefully to the views of the other jurors and give your own views. If the views of others differ from your own, don't hold to your own position out of stubbornness, but, on the other hand, if you have a firm view, do not change it just because you happen to be in the minority. One other thing, sometimes jurors tend to decide they like one lawyer rather than another. Of course, you are going to pay attention to the evidence and not decide the case according to your liking of a lawyer, and you are not to speculate or guess about things which are

not in evidence, wondering why something hasn't been produced or what it would be if produced. You will have all the exhibits which are in evidence, except the hospital records, in the jury room with you, and, as I say, you will let me know if you have any problems.

Gentlemen, are there any requests or exceptions and, if so, do you want to be heard outside the presence of the jury?

MR. COLLINS, JR.: Your Honor, may be approach the sidebar?

THE COURT: All right.

(Thereupon an off the record discussion ensued at sidebar.)

THE COURT: Incidentally, as you first go down, I have already made arrangements for you to go to lunch, that will be the first order of business.

(Thereupon the jury exited the courtroom at 1:40 P.M.)

THE COURT: Yes, Mr. Griffin.

Requests and Exceptions.

MR. GRIFFIN: The Court mentioned on the matter of contributory negligence that the burden was on the defendant. I don't quarrel with that, but the Court I don't think explained to the jury that it is not necessary to produce witnesses on the subject, that you take all the evidence into consideration regardless of source.

THE COURT: All right. I did mention that on the plaintiff's end, that they would take all the evidence. I was cognizant of the fact and did not patch it up by saying that that would apply also to the defendants' burden.

MR. GRIFFIN: And I, of course, except to the following portions of the Court's instructions, namely, the Court's comment submitting any theory on Kendall's negligence in operating the train and speed. I except relative to no air in the cars, smoother stop, things of that nature. I respectfully except to that portion under causation where you mentioned it wouldn't have happened but for. I also except to that portion where you mentioned the non-delagable duty, in that there has been no -- the facts of this

case do not get into that in any respect. I respectfully except to that portion wherein the Court makes reference to strict liability, and also defines a defect as a use and condition which presented unnecessary peril, that portion.

THE COURT: All right. Now, the question of delagability, I suppose, arises out of the obfuscation of the defendants here; one is am employer and has certain responsibilities arising out of being the employer, and the other owns the equipment, and the other one borrows the equipment, and we haven't bothered sorting these, and sort of put them into one pocket.

MR. GRIFFIN: That is true. I don't believe the Court gave the instruction relative to circumstance or condition pertaining to the seat, whereas you did relative to the valve, and I except to your not granting that.

THE COURT: I don't follow you on that.

MR. GRIFFIN: Well, you said that you were going to grant in substance Request Number 2, which asks that the jury be instructed that if they find that the seat was only a circumstance

or occasion present and not a cause of the accident, there is no liability on defendant's part.

THE COURT: I think I have covered that in my general instructions. I went over it a couple of times. I know I referred particularly --

MR. GRIFFIN: I have previously taken the exceptions to your not granting the various written requests, and so forth. Of course, before we depart, I think I should complete my motions, and there is one other matter, but that is not for the jury.

THE COURT: What motions.

MR. GRIFFIN: Well, your Honor, the motions that I made -- I don't think the record shows that you granted or denied that -- where the motions to be made at the close of the plaintiff's case. Of course, I wanted to renew those on the affirmative grounds at the close of all the evidence.

THE COURT: All right.

MR. GRIFFIN: That doesn't pertain to the jury.

MR. COLLINS, SR.: Your Honor, we take exception to that part of the charge wherein you stated plaintiff claims that the accident happened solely

and exclusively through actions of the railroad, and we also except to that part of the charge where you said the Boiler Inspection Act, if it had anything in whole or in part -- if the violation of the Act had anything in whole or in part, we except to that language, "in whole or in part," we claim it should be in any way had any --

THE COURT: The charge on that point, taken all together, comes out as you stated it should come out.

MR. COLLINS, SR.: We say the "whole or in part" may apply to Section 51, not to 23.

THE COURT: I understand.

MR. COLLINS, SR.: We also except to the statement that the mere fact the accident happened isn't evidence of negligence. We take exception to the Court's charge on foreseeability, and especially where there is no foreseeability there is no negligence. We claim that a safe place to work doesn't -- or a Boiler Inspection doesn't call for foreseeability. We also take exception to the standard set of a reasonable prudent person, that this isn't common law negligence, it is set by the statute, the statute sets forth the

requirement. We take exception to the Court's comment on the evidence as being slim and, of course, we except to the denial of the requests to charge that we previously requested.

THE COURT: All right.

(Thereupon the jury entered the courtroom at 1:45 P.M.)

THE COURT: You don't have to take your seat, just come into the back of the room. I mentioned when you are considering whether the plaintiff had carried his burden of proving by a fair preponderance of the evidence any particular issue that you could look to all of the evidence in the case, whether it is put in by direct examination or cross examination or through any of the documentary evidence, and I should have mentioned at the same time that this also applies when you are considering -- if you get to this point -- if you are considering whether the defendant has carried its or their burden on showing contributory negligence, again,

you would look to all of the evidence in the case, the direct examination of all of the witnesses, the cross examination, and any of the documentary evidence. All right, swear the deputy marshals.

(Thereupon two deputy marshals were duly sworn.)

THE COURT: As the first order of business the jury will go to lunch.

(Thereupon the jury exited the courtroom at 1:50 P.M.)

MR. COLLINS, SR.: Your Honor, I missed one exception to your charge that I would like to put on the record, your part of the charge that the jury couldn't consider the fact that the defendant didn't bring in certain witnesses or draw any implications from that.

THE COURT: You never asked for it.

MR. COLLINS, SR.: I state that you charge the opposite, that is not the law, your Honor.

THE COURT: No, I did not, I started to make a verbal

mis-step in that direction and quickly corrected it.

MR. GRIFFIN: I would also just put this on the record, your Honor, relative to the matter that was mentioned about certain evidence being slim. I, of course, objected to the theory --

THE COURT: As being an issue in the case.

MR. GRIFFIN: Right. Further, the characterization "slim" might imply the other was stronger, and we have that particular problem. With respect --

THE COURT: No problem, it is noted.

MR. GRIFFIN: With respect to the motions, your Honor, before I make the next motion --

THE COURT: I will deny the earlier motion.

MR. GRIFFIN: The Court's ruling is that it is denied? I except. At the close of all of the evidence, I moved to renew all motions previously made and on the grounds made for a directed verdict and dismissal, and upon the further ground that it affirmatively appears from the evidence that there is no liability, there is no cause of action established, and any other determination would be against the weight of the credible evidence, and that is a matter of law the Court would be

required to set aside a verdict.

THE COURT: I will deny that.

MR. GRIFFIN: Lastly, so the record will be clear, it has been previously mentioned in the Court's chambers before the start of the case that should there be any adverse verdict, as far as the defendant, the defendant reserves the right to apply for a reduction in the amount of any monies paid relative to medical expenses and hospital expenses.

THE COURT: So understood, that will be done.

MR. GRIFFIN: Thank you.

(Thereupon the court was in recess at 1:55 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 4:59 P.M.

(Jury present.)

THE COURT: Mr. Tussing, I have word from you that the jury has reached a verdict?

FOREMAN: Yes, your Honor.

THE COURT: What is the verdict?

FOREMAN: The verdict we have reached is no cause of

action for negligence.

THE COURT: Now, have you considered also the claim or cause of action based upon a violation of the Boiler Inspection Act?

FOREMAN: No, we haven't.

THE COURT: I must have you go down and do that. You have come to this conclusion as to the cause of action based on negligence, namely, the failure to provide a safe place to work and any negligent operation in the locomotive and train, but you must now consider whether or not there is any violation of the Boiler Inspection Act and, if there is a violation, whether this accident and these injuries were caused to any degree by any such violation. Then, of course, if you find that there were injuries caused by such a violation, then you would have to fix damages. I will send you back for that purpose.

FOREMAN: Yes, sir.

(Thereupon the jury exited the courtroom at 5:00 P.M.)

THE COURT: I expect the next thing is that they will come back probably wanting some particularization of what is involved in the Boiler Inspection Act. Are you going to be returning to your offices?

MR. GRIFFIN: I propose to wait for awhile, your Honor.

(Thereupon the court was in recess at 5:03 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 5:35 P.M.

(Jury absent.)

THE COURT: All right, we have the anticipated interesting note. "Please clarify what points we are to consider concerning labor laws." Obviously the reference is to the Boiler Inspection Act, which has nothing to do with labor laws, per se, but I propose to read to them again the charge that I gave them concerning the Boiler Inspection Act.

MR. COLLINS, SR.: Your Honor, might I state for the record that the interrogatories, the special questions that we asked, would clarify the issue and let the jury answer those, and I

think you would solve the problem. I don't think Mr. Griffin would object.

MR. GRIFFIN: I would certainly object at this stage.

THE COURT: No, we don't need them. Bring the jury up.

MR. GRIFFIN: Your Honor, the other thing that is a little surprising to me, as I recall the Court's instructions to the jury, they were directed first to consider whether or not there was any violation of the Boiler Inspection Act and the causation thereof, and so forth, and then the matter of negligence, and in my judgment, implicit in their statement of their verdict was that they had in fact decided that adversely to the plaintiff.

THE COURT: Negated by Mr. Tussing's express answer to my question that they hadn't.

MR. GRIFFIN: It was a rather short question and answer, and I am frank to say that I just don't know what the situation is, and I don't know what the jury's question is.

(Thereupon the jury entered the courtroom at 5:41 P.M.)

THE COURT: It always takes just a little bit of time

to convene the meeting again after I get your note, and I apologize for the delay since having had your note, but about ten after five. Now, your note, Mr. Tussing, was to the effect, "Please clarify what points we are to consider concerning labor laws." Actually, there is nothing or no part of the labor laws, as such, that apply here, but obviously we have been talking about the Boiler Inspection Act and requirements of that Act, and placing that in the context of its effect upon an employee, so consequently we are in the labor aspect, and I take it that is what you have reference to?

FOREMAN: Yes.

THE COURT: I will read to you the material I gave you earlier concerning this Act, and see where that leaves us. I told you preliminarily to this part of the charge that plaintiff was suing on two theories; one, that there had been negligence on the part of the railroads in failing to provide a safe place to work or otherwise, and secondarily, that they were alleging a violation of the

Boiler Inspection Act. Now, in that connection I said that plaintiff alleges that at the time and place in question the locomotive in which he was working was defective in this respect, that the front seat on the left or the fireman's seat did not and would not function properly by swiveling freely, and an emergency brake valve was improperly located in the locomotive cab. Those are the two alleged violations of the Act, either one, of course, of which would be sufficient. Plaintiff further alleges that the defective seat and the valve's location were causes of plaintiff's injuries and consequent damages. The Boiler Inspection Act, 45 United States Code, Section 23 provides in full, "It shall be unlawful for any carrier -- and I interjected there the fact that these defendants, each of them, is a carrier -- to use or permit to be used on its lines any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same were put.

That the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomot[illegible]ts boiler, tender, and all parts and appurtena[illegible]es thereof have been inspected from time to time in accordance with the provisions," and so on, and it went on relative to inspection. I said that this statute does not make the defendants the guarantors of the safety of their employees, however, and plaintiff is not entitled to an award of damages simply because he was injured. In order to recover, plaintiff must prove that there was a violation of the statute by defendants or either of them, and that his injury was caused in whole or in part by that violation. If he proves by a preponderance of the evidence that either defendant violated the statute and that the violation contributed to his injury, he is entitled to recover even though the railroad exercised care and was not negligent, and even though the plaintiff was guilty of negligence contributing to the occurrence, or with knowledge of the

violation, continued to work on the locomotive. Now, I told you that if you did find a violation of the Act, which was causative to any degree and in any way of the accident and injuries, that you would not do what you would have done if you had found negligence, namely, consider contributory negligence, and also the latter part of this, you would not consider whether Mr. Eggert had assumed the risk of his situation. This statute is violated when the locomotive is operated in an unsafe condition, that is, when it is used in a condition which presents an unnecessary peril to life or limb. It is for you to determine whether the front seat was defective, and whether the presence of such seat or the arrangement of the emergency brake valve was a violation of the statute. If you find the statute was not violated or, that although it was, such violation played no part whatsoever in causing plaintiff's injury, your verdict would be for the defendants. If, on the other hand, you find that the statute was violated and that plaintiff's injury

was caused in whole or in part by such violation, your verdict would be for plaintiff, and you would proceed to consider the question of damages. Why don't you just check your house, Mr. Tussing, and see if anybody needs anything further?

(Thereupon jurors conferred.)

THE COURT: Is that all right?

FOREMAN: Fine.

THE COURT: You may retire then.

(Thereupon the jury exited the courtroom at 5:50 P.M.)

THE COURT: All right. Let's see what next jumps out of the sack.

(Thereupon the court was in recess at 5:51 P.M.)

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 6:21 P.M.

(Jury present.)

THE COURT: Mr. Tussing, I have a note indicating that the jury has now reached a verdict as to the cause of action based upon a violation of the Boiler Inspection Act, is that so?

FOREMAN: Yes, your Honor.

THE COURT: What is that verdict?

FOREMAN: After carefully reviewing the evidence, we find no violation of the Boiler Inspection Act in regard to the placement of the brake valve and defective seat.

THE COURT: Thank you.

MR. COLLINS, SR.: Poll the jury, please, your Honor?

THE COURT: All right.

(Thereupon the jury was polled, each juror responding in the affirmative.)

THE COURT: Thank you again, and you are excused at this time. Now, I don't know when we will next have you back, we will be in touch with you and, as far as talking with any of the parties or any of the attorneys, you are under no obligation to do so, you may do so if you want, and all I say is that if you do, refrain from talking about the

Certificate.

details of your deliberations in the jury room. I will leave that completely up to you. Thank you very much.

(Thereupon the jury exited the courtroom at 6:23 P.M.)

MR. COLLINS, SR.: Could I reserve my right to make motions?

THE COURT: Yes. How much time do you want?

MR. COLLINS, SR.: Is a week satisfactory?

THE COURT: Fine. The 25th is a holiday, should we say the 26th?

MR. COLLINS, SR.: The 26th at nine o'clock?

THE COURT: Yes.

MR. GRIFFIN: Will there be a written notice of this?

THE COURT: I think not, no. Nine o'clock on Tuesday, October 26th.

(Thereupon the court was in recess at 6:25 P.M.)

I hereby certify that this record is a true and accurate transcript from my stenographic notes in this proceeding.

Official Reporter
U. S. District Court

Appendix B—Summons and Complaint.

Appendix B
Summons and Complaint.

SUMMONS IN A CIVIL ACTION

CIV. 1a (3-61)
(Formerly D.C. Form No.1 Rev. 6-49)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. ——

THOMAS W. EGGERT
25A Garden Village Drive
Cheektowaga, New York

Plaintiff

v.

NORFOLK & WESTERN RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

ERIE LACKAWANNA RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

Defendant

SUMMONS

BEST COPY AVAILABLE

To the above named Defendant s

You are hereby summoned and required to serve upon

WEBER & WESTON

plaintiff's attorney s, whose address 1300 Genesee Building, Buffalo, New York 14202

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk

Date:

[Seal of Court]

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Appendix B—Summons and Complaint.

Appendix B
Summons and Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT
25A Garden Village Drive
Cheektowaga, New York

Plaintiff

-vs-

NORFOLK & WESTERN RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

ERIE LACKAWANNA RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

Defendants

COMPLAINT

Plaintiff demands Trial by Jury

The Plaintiff, THOMAS W. EGGERT, appearing by WEBER & WESTON, F. LAMBERT HALEY of counsel, his attorney, says:

1. This action is being brought against the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, pursuant to the provisions of the Federal Employer's Liability Act, Title 45, U. S. Code, Section 51, et seq.

2. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, is and was at all times mentioned herein, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware and is and was at all times mentioned herein, a common carrier engaged in interstate commerce by railway.

Appendix B—Summons and Complaint.

Appendix B
Summons and Complaint.

3. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, is and was at all times mentioned herein, a corporation duly organized, created and existing under and by virtue of the laws of the State of Virginia and is and was at all times mentioned herein, a common carrier engaged in interstate commerce by railway.

4. On or about the 22nd day of June, 1971, and for some time prior thereto, the Plaintiff was employed by the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, in furtherance of that Defendant's business in interstate commerce.

5. On or about the 22nd day of June, 1971, the Plaintiff was assigned as a member of the crew of the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, as a locomotive engineer on a locomotive engine, number N & W 2500, owned by the Defendant, NORFOLK & WESTERN RAILWAY COMPANY, which engine was bailed by the Defendant, NORFOLK & WESTERN RAILWAY COMPANY, to the Defendant, ERIE LACKAWANNA RAILWAY COMPANY; the Plaintiff's said employment consisted in the operation of said engine in the switching of cars owned by both Defendants, in furtherance of the Defendants' business in interstate commerce.

6. By virtue of the negligence of the Defendants, NORFOLK & WESTERN RAILWAY COMPANY and ERIE LACKAWANNA RAILWAY COMPANY, its agents, servants and employees, with respect to the careless and reckless operations of the so-called "Bison Yard", the failure of the Defendants to maintain the railway locomotive in a proper working condition, the failure of the Defendants to provide the Plaintiff with a safe and proper place to work, the

Appendix B—Summons and Complaint.

failure of the Defendants to properly inspect the locomotive, the failure of the Defendants to warn or advise the Plaintiff of possible hazards to his health and safety, the failure of the Defendants to comply with the Federal Safety Appliance and Equipment Act, the failure of the Defendants to comply with the applicable Federal laws, the failure of the Defendants to provide the Plaintiff with a new engine free of hazardous and unguarded equipment and devices, and ordering the Plaintiff to work with faulty equipment, the Plaintiff was caused to suffer severe, painful and permanent injuries and has been and will be caused to lose time from his railway employment and to incur and pay expenses for reasonable hospital and medical care.

WHEREFORE, the Plaintiff demands judgment against the Defendants, NORFOLK & WESTERN RAILWAY COMPANY and ERIE LACKAWANNA RAILWAY COMPANY in the sum of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) together with the costs and disbursements of this action.

Dated: Buffalo, New York
July , 1973

Yours, etc.

WEBER & WESTON by
F. LAMBERT HALEY, of counsel
1300 Genesee Building
Buffalo, New York 14202
(716) 852-4480

Appendix C—Plaintiff's Answers to Interrogatories.

Appendix C
Plaintiff's Answers to Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

Plaintiff

-vs-

NORFOLK & WESTERN RAILWAY COMPANY
and
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

FADEL

ANSWERS TO INTERROGATORIES

Civil Action No. 1973-370

The Plaintiff, for his answers to the Defendant's interrogatories, alleges as follows:

1. June 22, 1971 at approximately 2:30 a.m. in the cab of NORFOLK & WESTERN Engine No. 2500 in the Bison Yard of the Defendant, ERIE LACKAWANNA RAILWAY COMPANY.

2. The Plaintiff was seated on the front seat of the locomotive cab on the left side. He attempted to turn to the right and the seat did not swivel as it should have. The Plaintiff attempted to arise from the seat and his left knee struck an unguarded emergency air brake valve.

3. The job classifications of the Plaintiff's fellow crew members who were working with him at the time of the accident, were fireman, conductor and two switchmen. The fireman was named William Kendall, but the names and addresses of the other crew members are not presently available to the Plaintiff.

4. The fireman, William Kendall, was on the right side of the locomotive cab at the controls. One of the swirchmen

Appendix C—Plaintiff's Answers to Interrogatories.

was in the locomotive cab and the conductor and the other switchman were on the ground along the right side of the train.

5. Among other things, the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, did not provide the proper type of yard switching locomotive for the job which the Plaintiff and his crew were ordered to do. The locomotive the Plaintiff was operating was a road locomotive not properly suited for yard switching work.

6. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, failed to properly maintain the seats in the said locomotive and also failed to provide a guard or safety device over the emergency brake valve.

7. Seats of the locomotive cab did not swivel or turn as they should have and the pipes and the valve and handle of the emergency air brake protruded out into the space which the Plaintiff occupied while working in the cab.

8. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, failed to warn or advise the Plaintiff of the conditions described above.

9. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, failed to provide the Plaintiff with safe equipment and did order the Plaintiff to work with an unsafe engine, knowing that said engine was unsafe. The Defendant failed to properly inspect the said engine and failed to dispatch any mechanics, car

Appendix C—Plaintiff's Answers to Interrogatories.

repairmen or other employees to repair or rectify the conditions.

10. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, violated the provisions of 45 USC 23 and failed to comply with all applicable provisions of every federal, state and local law, rule or regulation pertaining to the operation and maintenance of railroad locomotives.

11. The Yardmaster in the West End Tower of the Bison Yard.

12. Please refer to paragraphs above.

13. The Plaintiff sustained an internal derangement of the left knee joint with chondromalacia patellae and degeneration of the medial meniscus, resulting in weakness and instability of the left leg.

14. The injuries the Plaintiff's left knee sustained are believed to be permanent and progressive in nature.

15. For the past five (5) years the Plaintiff has been employed by the ERIE LACKAWANNA RAILWAY COMPANY, 1221 Clinton Street, Buffalo, New York. The Plaintiff's daily rate of pay fluctuated between $50.00 and $150.00 depending on the hours worked, mileage traveled, overtime and allowances.

16. The Plaintiff was incapacitated from work from the date of the accident until about January 4, 1972. Then again from about June 14, 1972 to January 4, 1973.

He has continued to lose time from work on many

Appendix C—Plaintiff's Answers to Interrogatories.

occasions since he returned.

17. The exact amount of earnings the Plaintiff has lost from his job at the ERIE LACKAWANNA RAILWAY COMPANY cannot be stated at this time but it is approximated to be $39,000.00.

18. The Plaintiff was confined to the hospital for 12 days, to his bed for approximately 4 weeks and to his home for a period of approximately 5 months except for occasional outings and visits to his doctor.

19.

(a)	hospital expense	$1,146.15
(b)	physicians' expense	674.35
(c)	x-rays and medical supplies	
(d)	nurses	0
(e)	household help	$1,500.00

20. The Plaintiff continues to be unable to work without difficulty and continues to lose time from work. It is expected that this condition will continue in the future.

21. The identity of any expert witnesses is not known to the Plaintiff at this time. This information will be supplied when available.

s/ Thomas W. Eggert

Subscribed and sworn to before
me this 30th day of January, 1974

s/ J. Lambert Haley
Notary Public

Appendix C—Plaintiff's Answers to Interrogatories.

Appendix C
Plaintiff's Answers to Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Ford NAW

THOMAS W. EGGERT

Plaintiff

-vs-

NORFOLK & WESTERN RAILWAY COMPANY
and
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

ANSWERS TO INTERROGATORIES

Civil Action No.
1973-370

The Plaintiff, for his answers to the Defendant's interrogatories, alleges as follows:

1. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, did not provide the proper type of yard switching locomotive for the job which the Plaintiff and his crew were ordered to do. The locomotive the Plaintiff was operating was a road locomotive not properly suited for yard switching work.

The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, failed to properly maintain the seats in the said locomotive and also failed to provide a guard or safety device over the emergency brake valve.

The seats of the locomotive cab did not swivel or turn as they should have and the pipes and the valve and handle of the emergency air brake protruded out into the spece which the Plaintiff occupied while working in the cab.

2. The Plaintiff sustained an internal derangement of the left knee joint with chondromalacia patellae and degeneration of the medial meniscus, resulting in weakness and instability of the left leg.

Appendix C—Plaintiff's Answers to Interrogatories.

Appendix C
Plaintiff's Answers to Interrogatories.

3. The Plaintiff was confined to the hospital for 12 days, to his bed for approximately 4 weeks and to his home for a period of approximately 5 months except for occasional outings and visits to his doctor.

4. The Plaintiff was incapacited from work from the date of the accident until about January 4, 1972 and again from June 4, 1972 to January 4, 1973. He has continued to lose time from work on many occasions since he returned.

5.

(a)	hospital expense	$1,146.15
(b)	physicians' expense	674.35
(c)	medical expenses	
(d)	nurses	0
(e)	loss of earnings	39,000.00

6. The exact amount of damages to the Plaintiff is not known at this time.

7. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, violated the provisions of 45 USC 23 and failed to comply with all applicable provisions of every federal, state and local law, rule or regulation pertaining to the operation and maintenance of railroad locomotives.

8. The Plaintiff was seated on the front seat of the locomotive cab on the left side. He attempted to turn to the right and the seat did not swivel as it should have. The Plaintiff attempted to arise from the seat and his left knee struck an unguarded emergency air brake valve.

Appendix C—Plaintiff's Answers to Interrogatories.

Appendix C
Plaintiff's Answers to Interrogatories.

9. The Plaintiff was a locomotive engineer.

10. This information is not presently available to Plaintiff.

11. Joseph D. Godfrey, M. D., Daniel E. Curtin, M. D., Richard L. Weiss, M. D., Bert A. Lies, Jr., M. D., 77 Bryant Street, Buffalo, New York and Samuel Militello, M. D., 3435 Bailey Avenue, Buffalo, New York.

12. We do not have the exact number of times the Plaintiff was treated by his physicians.

13. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, did not provide the proper type of yard switching locomotive for the job which the Plaintiff and his crew were ordered to do. The locomotive the Plaintiff was operating was a road locomotive not properly suited for yard switching work.

The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, failed to provide the Plaintiff with safe equipment and did order the Plaintiff to work with an unsafe engine, knowing that said engine was unsafe. The Defendant failed to properly inspect the said engine and failed to dispatch any mechanics, car repairmen or other employees to repair or rectify the conditions.

s/ Thomas W Eggert

Subscribed and sworn to
before me this 30th day of
January, 1974

s/ J. Hamlet Staley
Notary Public

Appendix D—Judgment on Verdict and Notice of Appeal.

JUDGMENT ON JURY VERDICT — CIV 31 (7-63)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 1973-370

THOMAS W. EGGERT

vs.

NORFOLK & WESTERN RAILWAY COMPANY and ERIE LACKAWANNA RAILWAY COMPANY

JUDGMENT

This action came on for trial before the Court and a jury, Honorable John T. Elfvin, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that there is no cause for negligence and no violation of Boiler Inspection Act.

FILED
OCT 15 8 02 AM '76

Dated at Buffalo, New York, this 14th day of October, 1976.

JOHN E. ADAMS
Clerk of Court

Appendix D—Judgment on Verdict and Notice of Appeal.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

Plaintiff

vs-

NORFOLK & WESTERN RAILWAY COMPANY
-and-
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

CIVIL ACTION NO.
1973-370

NOTICE OF APPEAL

Notice is hereby given that THOMAS W. EGGERT, the plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit, from a judgment on jury verdict, entered the 14th day of October, 1976, in which it was ordered and adjudged that there is no cause for negligence and no violation of the Boiler Inspection Act, which judgment and order were duly entered by the Clerk of the Court on the 14th day of October, 1976, after trial before the Honorable Judge John T. Elfvin, Federal District Court Judge, for the Western District of New York.

JOHN F. COLLINS
Attorney for Plaintiff
Office & P. O. Address
Suite 464 Statler Hilton
Buffalo, New York 14202

Appendix E—Subpoenas to Defendants Erie Lackawanna Railway Co. and Norfolk & Western Railway Co.

PLAINTIFF'S EXHIBIT 35

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

vs.

NORFOLD & WESTERN RAILWAY CO. &
ERIE LACKAWANNA RAILWAY COMPANY

CIVIL ACTION FILE NO.

No. 73-370

To

ERIE LACKAWANNA RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Western District of New York at the Courthouse in the city of Buffalo on the 5th day of October 19 76 at 10:00 o'clock a. M. to testify on behalf of plaintiff

in the above entitled action and bring with you all wage and work records of Thomas W. Eggert for years 1969 through present; wage agreements showing rates for enginemen for years 1971 through 1976; all inspection and repair or work reports of N&W locomotive No.2500 for the year 1971; and in particular reports showing damage to the inside of the cab of this locomotive, all accident and repair reports wherein employee Harold Parker was injured while an employee of EL Ry. while working on N&W locomotive 2500 prior to June 21, 1971; yard map or diagram showing the Bison Yard expecially showing the crossing of Halstead Street, Sloan, New York, and the Main (City Main) track located thereat; all photographs taken of the Bison

(continued on attached sheet)

October 1, 19 76

COLLINS, COLLINS & DI NARDO
Attorney for Plaintiff
Suite 464 Statler Hilton
Address
Buffalo, New York 14202

John C. Collins
Clerk.

By _____, *Deputy Clerk.*

RETURN ON SERVICE

Received this subpoena at _____ on _____ and on _____ at _____
served it on the within named _____
by delivering a copy to h _____ and tendering to h _____ the fee for one day's attendance and the mileage allowed by law.[1]

Dated: _____

_____, 19____

By _____

Service Fees
Travel _____$
Services _____
Total _____$

Subscribed and sworn to before me, a _____ this _____ day of _____, 19 .

_____

[1] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

NOTE.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

FPI: 61—3-28-75-500 P600-9002

Appendix E—Subpoenas to Defendants Erie Lackawanna Railway Co. and Norfolk & Western Railway Co.

continued - Civil Subpoena to Produce Document or Object

Yard following an accident of June 21, 1971 as well as photographs of N&W Engine 2500 both exterior and interior; any and all signed statements taken from employee Thomas W. Eggert following accident of June 21, 1971 as well as all statements taken from members of the crew working with Thomas W. Eggert on June 21, 1971 or any other employee having knowledge of the aforesaid accident; any and all communication, agreements or written understandings between defendants, ERIE LACKAWANNA RAILWAY COMPANY and NORFOLK & WESTERN RAILWAY COMPANY in effect on June 21, 1971.

Appendix E--Subpoenas to Defendants Erie Lackawanna Railway Co. and Norfolk & Western Railway Co.

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

PLAINTIFF'S EXHIBIT 36

CIVIL ACTION FILE NO.

THOMAS W. EGGERT

vs.

NORFOLK & WESTERN RAILWAY CO. &
ERIE LACKAWANNA RAILWAY COMPANY

No. 73-370

To
NORFOLK & WESTERN RAILWAY CO.
1221 Clinton Street
Buffalo, New York

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Western District of New York at the Courthouse in the city of Buffalo on the 5th day of October 1976 at 10:00 o'clock a. M. to testify on behalf of plaintiff

in the above entitled action and bring with you all wage and work records of Thomas W. Eggert for years 1969 through present; wage agreements showing rates for enginemen for years 1971 through 1976; all inspection and repair or work reports of N&W locomotive No. 2500 for the year 1971; and in particular reports showing damage to the inside of the cab of this locomotive, all accident and repair reports wherein employee Harold Parker was injured while an employee of EL Ry. while working on N&W locomotive 2500 prior to June 21, 1971; yard map or diagram showing the Bison Yard especially showing the crossing of Halstead Street, Sloan, New York, and the City Main Track located thereat; all photographs taken of the Bison Yard

(continued on attached sheet)

October 1, 1976

COLLINS, COLLINS & DI NARDO
Attorney for Plaintiff
Suite 464 Statler Hilton
Address
Buffalo, New York 14202

_____ *Clerk.*

By _____ *Deputy Clerk.*

RETURN ON SERVICE

Received this subpoena at _____ on _____ and on _____ at _____

served it on the within named _____ by delivering a copy to h _____ and tendering to h _____ the fee for one day's attendance and the mileage allowed by law.[1]

Dated: _____

_____, 19____ By _____

Service Fees
Travel _____$
Services _____
Total _____$

Subscribed and sworn to before me, a _____ this _____ day of _____, 19____

_____

[1] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

NOTE.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

Appendix E—Subpoenas to Defendants Erie Lackawanna Railway Co. and Norfolk & Western Railway Co.

following an accident of June 21, 1971 as well as photographs of N&W Engine 2500 both exterior and interior; any and all signed statements taken from employee Thomas W. Eggert following accident of June 21, 1971 as well as all statements taken from members of the crew working with Thomas W. Eggert on June 21, 1971 or any other employee having knowledge of the aforesaid accident; any and all communication, agreements or written understandings between defendants, ERIE LACKAWANNA RAILWAY COMPANY and NORFOLK & WESTERN RAILWAY COMPANY in effect on June 21, 1971.

Appendix F—Amended Pre-Trial Statement of Plaintiff.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

Plaintiff

vs-

NORFOLK & WESTERN RAILWAY COMPANY
-and-
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

AMENDED PRE-TRIAL STATEMENT

CIVIL ACTION NO. 1973-[illegible]

STATEMENT OF FACTS:

Plaintiff amends the statements of facts submitted in the original pre-trial statement to include:

1. that the slack run in on the night of the accident was improper in that it caused plaintiff to fall and that this hard train and abrupt stop was caused by the negligence of the defendants, its agents or its employees including but not limited to the engineer in the operation of the train and the ground crew in not applying a proper amount of air to the drag of cars in order to minimize the adverse effect of slack action, hard run in and abrupt stops which might cause injury to plaintiff.

EXHIBITS:

Plaintiff may introduce copies of the Erie Lackawanna Book of Safety Rules, Operating Rules and/or Operating Time Table.

These exhibits are all in the possession of defendant and will present no surprise to him.

WITNESSES:

Reserve 1. Plaintiff may call Mr. Robert Godwin, Local Chairman, Division #15 of the Brotherhood of Locomotive Engineers to:

a. testify about the filling out and availability of Locomotive Inspection reports;

b. the earnings of an engineer with Mr. Eggert's seniority

who is physically capable of working the extra board;

c. the requirement of air in cars in making switching movements in order to decrease the possibility of adverse slack run in and abrupt stops and the safe procedure for decelerating a locomotive.

2. Plaintiff may call Mr. Charles Bethge, Local Chairman, U.T.U., Local 1530, and Local Legislative Representative #1530 to testify about the requirement of air in cars in making switching movements to decrease the possibility of adverse slack run in and abrupt stops.

3. Plaintiff may call the members of the ground crew, whose identity is known to the defendant to testify about the number of cars, the type of movement, whether or not there was air in the cars, etc.

Rebuttal 4. Plaintiff may call Mr. Harold Parker, Engineer, employed by defendant as a rebuttal witness to contest the railroads' claim that the inspection and repair of locomotives are made if the defect is reported, and also to testify to the fact that even though the railroad knows the defect exists, they order their employees to work with unsafe equipment.

Rebuttal 5. Plaintiff may call the Master Mechanic of defendant railroad to testify about repairs made to locomotives after the repairs are reported.

COLLINS, COLLINS & DI NARDO
Attorneys for Plaintiff
Office & P. O. Address
Suite 464 Statler Hilton
Buffalo, New York 14202

Appendix G—Plaintiff's Request to Charge.

RECEIVED

OCT 8 1976

JOHN T. ELFVIN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

Plaintiff

vs-

NORFOLK & WESTERN RAILWAY COMPANY
and
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

PLAINTIFF'S REQUEST TO CHARGE

The plaintiff respectfully requests the Court to include in its charge to the jury the following:

A. That under the applicable federal law regarding the use of locomotives by a railroad on their line, the law states that:

> "It shall be unlawful for any railroad to use or permit to use on its line any locomotive unless said locomotive its boiler, tender and all parts and appurtenances thereof are:

1. in proper condition to operate in the service to which they are put in;

2. that the locomotive being used by the railroad must not present an unnecessary peril to life or limb;

3. that the locomotive, its boiler, tender and all parts and appurtenances thereof must be inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of the Federal Law.

4. that the locomotive be able to withstand such test or tests as are prescribed by federal rules and regulations.

Appendix G—Plaintiff's Request to Charge.

B. If you find from the facts of this case that the railroad was in violation of the Federal Boiler Inspection Act in assigning plaintiff to work on a locomotive which was unsafe or which caused unnecessary peril to his life or limb and that this fact alone caused in any, no matter how slight, the injuries which plaintiff has suffered, then you need not find any other negligence on the part of the railroad, to find the railroad liable as a matter of law to plaintiff. (See Lilly v. Grand Trunk R. Co. 317 US at 485, where Supreme Court stated that "Negligence is not the basis for liability under the Act. Instead it imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenance thereof, in proper condition, and safe to operate... without unnecessary peril to life or limb).

C. That under the provisions of federal law a railroad has a non-delegable, affirmative duty not to use any locomotive which is an unsafe or improper condition or a locomotive which or can cause an unnecessary peril to plaintiff's life or limb. (Calabritto v. New York New Haven and Hartford R. Co. 287 F2d 394 (1961) Minehart v. Southern 288 P 2d 999.

D. That under the provisions of federal law and the Federal Boiler Inspection Act a locomotive seat is considered an appurtenance or part of that locomotive and must be in a safe and proper working condition so as not to cause unnecessary peril to plaintiff's life or limb.(45 USC 23, Lilly v. Grand Trunk.

E. That under the provisions of federal law and the Federal Boiler Inspection Act a brake valve on a locomotive is considered an appurtenance or part of that locomotive and must be in a proper working condition so as not to cause unnecessary peril to life or limb.

F. That if you find that the condition of the N&W locomotive 2500 was unsafe or improper in any way or that it caused unnecessary peril

Appendix G—Plaintiff's Request to Charge.

to plaintiff's life or limb or that the unnecessary inspections and repairs were not made and that this fact contributed to the injuries suffered by the plaintiff, in any way, no matter how slight, then you must find as a matter of law that the defendant railroads are liable to the plaintiff for the injuries suffered by the plaintiff.

G. If you find that the seat in N&W locomotive 2500 was not in a safe and proper working order or that it created an unnecessary peril to plaintiff's life and limb, or that it was not properly inspected and repaired and that this fact or any of these facts contributed in any way, no matter how slight, to the injuries suffered by plaintiff then you must find the defendant railroad liable to the plaintiff as a matter of law. (45 USC 23 Whalen v. Penn Central 503 F2d 886, Calabritto v. New York, New Haven, Hartford R. Co. (287 F2d 394)

H. If you find that the emergency brake valve in N&W locomotive 2500 was in an improper and unsafe condition so as to render locomotive 2500 unsafe to work with or an unnecessary peril to plaintiff's life or limb and that this condition contributed to plaintiff's injuries in any way no matter how slight then you must find as a matter of law that the defendant railroads are liable to plaintiff for his injuries.

If you find that the defendand railraod has violated the Federal Boiler Inspection Act and this violation has contributed in any way to plaintiff's injuries then you need deliberate no further and you must return a verdict as a matter of law for plaintiff.

I. That under the Code of Federal Regulations the railroad company is held responsible for the general design construction, inspection and repair of all locomotives used or permitted to be used on its line. 230. 200 (a) 49 CFR Transportation revised as of January 1, 1971.

Appendix G—Plaintiff's Request to Charge.

The railroad must know that all inspections, tests, and repairs are made and filed as required.

J. That all parts and appurtenances of every locomotive used must be maintained in proper condition as required by law and the rules and regulations of the Federal Code 230. 200 (a) 49 CFR Transportation revised January 1, 1971.

K. That each locomotive used by a railroad in yard service must be inspected at least one during the calendar day. A report of the above inspections shall be made on an approved form to the proper representative of the railroad whether such locomotive unit needs repairs or not. 230.203 49 EFR Transportation revised of January 1, 1971.

L. The form must show the name of the railroad; the initials and number of the locomotive, the place, date and time of the inspection; the defects disclosed by such inspection, and the signature of the employee making the inspection. 230.204 49 CFR Transportation.

M. If any defects exist which constitutes a violation of the Federal Boiler Inspection Act or any Federal Railroad Administration rules and regulations thereunder, such defects must be required before the locomotive is again used and proper notation made on the report to indicate that such repairs have been made and approved by the designated representative of the railroad. 230.203 (a) 49 CFR Transportation. The reports must be filed in the office of the railroad at the terminal at which the unit is cared for. 230.203 (a)

N. That the railroad is also under an affirmative, non delegable duty to provide its employees with a safe place to work.

Appendix G—Plaintiff's Request to Charge.

O. That if you find the railroad, it employees and/or its agents were negligent in failing to provide plaintiff with a safe place to work then you may find the railroad liable to plaintiff for his injuries; under this section of the Federal Law you must find negligence however, no matter how slight, which caused in any way, the injuries which plaintiff suffered.

P. If you find that the slack action was improper and that it was caused in any way by the negligent operation of the locomotive or train that plaintiff's injuries were caused in any way by this negligence then the railroad is liable to plaintiff for his injuries suffered.

(Rogers v. Missouri Pacific, 352 US 501)

If you find that the defendant railroads negligently failed to inspect and maintain its equipment and that this negligence contributed in any way, no matter how slight, to the injuries suffered by plaintiff, then you may find that the defendant railroads are liable to plaintiff.

Respectfully submitted,
John F. Collins
COLLINS, COLLINS & DI NARDO
Attorneys for Plaintiff
Office & P. O. Address
Suite 464 Statler Hilton
Buffalo, New York 14202

Appendix H—Plaintiff's Requested Interrogatories to Jury.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

THOMAS W. ECGERT

Plaintiff

vs-

NORFOLK & WESTERN RAILWAY COMPANY
and
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

RECEIVED
OCT 8 1976
JOHN T. ELFVIN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NEW

INTERROGATORIES TO JURY

No Interrogatories Prepared

I. Did you find that the seat on N&W locomotive 2500 was defective so as to render the locomotive unsafe or cause it to be an unnecessary peril to plaintiff's life or limb? YES or NO.

If answer is yes, answer questions #2

If answer is no, answer question #3

II. Did you find that the defective seat contributed in any way, no matter how slight, to the injuries suffered by plaintiff? YES or NO

If your answers to #1 and #2 are Yes, then you need proceed no further and you must return a verdict for plaintiff as a matter of law.

If your answers to #1 and #2 are No then answer questions #3 and #4.

III. Did you find that the unguarded emergency brake valve protruded out in the cab of the locomotive so as to render the locomotive unsafe or to cause the locomotive to be an unnecessary peril to plaintiff's life or limb? YES or NO.

If your answer to #3 is yes, answer #4.

IV. Did you find that this unguarded emergency brake valve which protruded out in the cab of the locomotive contributed in any way, no matter how slight to the injuries suffered by plaintiff, YES or NO.

John F. Collins

COLLINS, COLLINS & DI NARDO
Attorneys for Plaintiff
Suite 464 Statler Hilton
Buffalo, New York 14202

Appendix I—Index to Record on Appeal and Supplemental Index to Record on Appeal.

THOMAS W. EGGERT

Plaintiff - Appellant

vs-

NORFOLK & WESTERN RAILWAY COMPANY &
ERIE LACKAWANNA RAILWAY COMPANY

Defendant - Appellees

INDEX TO RECORD ON APPEAL

1. Summons & Complaint
2. Answer of defendant Norfolk & Western Railway Company
3. Answer of defendant Erie Lackawanna Railway Company
4. Interrogatories of defendant Norfolk & Western Railway Company
5. Interrogatories of defendant Erie Lackawanna Railway Company
6. Motion by defendant Norfolk & Western Railway Company for dismissal and compelling answers to interrogatories.
7. Motion to compel filing of answer to interrogatories
8. 30 day order to dismiss and compelling filing of interrogatories
9. Answers to interrogatories of defendant Norfolk & Western Railway Co.
10. Answers to interrogatories of defendant Erie Lackawanna Railway Co.
11. Defendant, Erie Lackawanna Railway Company's notice to take depositions of plaintiff.
12. Consent to substitution of attorneys for defendant Norfolk & Western Railway Company.
13. Consent to substitution of attorneys for plaintiff
14. Order of Court dismissing plaintiff's cause of action
15. Plaintiff's notice of appeal
16. Transcript of EBT (examination before trial)
17. Trial Transcript

Appendix I—Index to Record on Appeal and Supplemental Index to Record on Appeal.

18. Judgment and opinion of the Court of Appeals

19. Judgment on jury verdict

20. Notice of Appeal

EXHIBITS

Plaintiff's exhibits:

#1 - Photograph of engine
#2 - Diagram of yard
#3 - Photograph of engine
#9 - Photograph
#10 - Photograph
#11 - Time book
#12 - Time book
#13 - Time book
#14 - Time book
#15 - Time book
#16 - Time book
#25 - Photograph of engine 2500
#28 - W-2 form
#29 - Comp. basic rates
#30 - Accident report

Defendant's exhibits:

#1 - Photo - inside engine
#2 - Transcript of 1st trial - item #17 above
#3 - Inspection reports
#4 - Inspection reports
#5 - Inspection reports

TRANSCRIPTS:

Examination before trial March 11, 1975

Trial Transcript

Appendix I—Index to Record on Appeal and Supplemental Index to Record on Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT,

Plaintiff

v.

NORFOLK & WESTERN RAILWAY COMPANY and ERIE LACKAWANNA RAILWAY COMPANY,

Defendants

Civ-1973-370

CCA No. 76-7567

SUPPLEMENTAL INDEX TO RECORD ON APPEAL

21. Transcript of proceedings on 10/5/76

22. Transcript of proceedings on 10/6/76

23. Transcript of proceedings on 10/7/76

24. Transcript of proceedings on 10/8/76

25. Transcript of proceedings on 10/13/76

Appendix J—Federal District Court Docket Entries.

Civ-1973-370 Thomas W. Eggert vs Norfolk & Western Railway Company & 1

DATE	PROCEEDINGS	Date Order o Judgment Not
1973		
July 23	Filed Complaint w/demand for Jury Trial	
23	Issued Summons & 2 copies	
23	JS 5 made	
31	Filed Summons & Mar. Ret. on S&C served 7/26/73 on Norfolk & Western RR & Erie Lackawanna RR	
Aug. 10	Filed Deft. interrogatories.	
10	" Deft. Norfolk & Western answer.	
Sept. 13	" Deft. Erie Lackawanna's answer.	
13	" Deft. Erie Lack. interrogatories to Pltf.	
Dec. 18	Filed Deft. Norfolk & Western notice of motion for an order compelling Pltf. to answer interrogatories & dismissing complaint ret. 1-3-74	
1974		
Jan. 3	Filed order that Pltf. is to answer interrogatories dated 8-9-73 & if he fails to do so the complaint shall be dismissed-Curtin, DJ Notice & copies to Weber & Weston; Courtland LaVallee & Hodgson Russ, Andrews, Woods & Goodyear.	F-148
3	Motion by deft. to dismisse& compelling answers to interrogatories 30 day order granted.	
31	Filed Pltfs. answers to interrogatories.	
31	" Pltfs. answers to interrogatories.	
July 10	" Deft., Erie Lackawanna, notice to take deposition of Pltf.	
Nov. 13	" consent to substitution of attorney for deft. Norfolk & Western from Hodgson, Russ etc. to Moot, Sprague, Marcy etc.	
1975		
Jan. 16	Pretrial conference held before Magistrate Maxwell	
May 9	Filed EBT transcript of William Kendall and Thomas Eggert both taken on 3-11-75.	
June 27	Pretrial conference held before Magistrate Maxwell	
Sept. 2	The Ct. set case for trial on 10-28-75 before Judge Elfvin	
Oct. 28	Case reached for trial before Judge Elfvin and Jury	
29	Trial cont'd - dec. res. on defts'. motion for directed verdict of dismissal for failure of proof	
30	Court advised counsel that motion by deft. for directed verdict of dismissal is granted.	
30	Filed Judgment on Decision by the Court-Clerk (notice & cy. to Messrs. Semple and Griffin)	F-169
30	JS 6 made	
Nov. 13	Filed Pltfs. consent to substitution of attys. (found in file not filed or docketed)	
Nov. 26	" Pltf's. Notice of Appeal (copy mailed to Mr. Griffin and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Collins)	
Dec. 10	" transcript of the trial commencing on 10-28-75	
1976		
Jan. 9	Original papers, exhibits, docket entries and Clerk's certificate mailed to Clerk, CCA	
July 21	Filed Opinion and Judgment of CCA reversing Judgment of Dist. Ct. and remanding for further proceedings in accordance with opinion with costs in the amt. of $676.14 taxed against the appellees	
21	JS 5 made	
26	Original papers and exhibits returned from CCA	
Aug. 23	Court set trial date of 10-5-76	
Sept. 29	Pretrial conference held before Magistrate.	
	CLOSED Attic Randall	

Appendix J—Federal District Court Docket Entries.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 1973-370
Thomas W. Eggert	Norfolk & Western Railway Co & 1	PAGE ___ OF ___ PAGES

DATE 1976	NR.	PROCEEDINGS
Oct. 5		Case dalled to trial before Judge Elfvin with a jury.
6		Trial continued.
7		Trial continued. Ct. grants motion by deft. to strike testimony by pltf., then grants pltf's. motion to amend the pleadings. Ct. grants motion by deft. for a continuance to 10-13-76 then Ct. reserves decision on motion by deft. to withdraw the continuance, and will advise bounsel by end of the day.
8		Trial continued.
13		Trial continued. Jury reports verdict of no cause for negligence. The jury reports verdict of no violation of Boiler Inspection Act. The Ct. directs pltf. to make motion against verdict at 9:00am on 10-26-76
15		Filed Judgment on jury verdict-Clerk Notice & copies to E. Michael Semple, Moot, Sprague, Marcy, Landy, Fernbach & Smythe F-181
15		JS 6 made
Nov. 1		Adj. to 11-8-76 by consent & with approval of Ct.
4		Filed Pltf's. Affidavit and Motion in Limine to limit introduction of evidence upon trial, etc. (Granted see Ltr when rec'd. Roy Jr. 11/5)
4		" Pltf's. Notice of Appeal (copy mailed to Mr. Griffin and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Collins)
8		Notice of Appeal filed by Pltf.--argument against verdict stricken from calendar
Dec. 14		Original papers, exhibits, docket entries & Clerk's certificate mailed to Clerk, CCA
1977		
Feb. 15		Filed transcript of proceedings of 10-5-76.
15		" transcript of proceedings of 10-6-76.
15		" transcript of proceedings of 10-7-76.
15		" transcript of proceedings of 10-8-76.
15		" transcript of proceedings of 10-13-76.
17		Five volumes of transcript, supplemental docket entries and supplemental Clerk's certificate mailed to Clerk, CCA

CLOSED appeal

DC-111A (Rev. 1/75)